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Articles

REFORMING SCHOOL DISCIPLINE

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ABSTRACT—Public schools suspend millions of students each year, but less than ten percent of suspensions are for serious misbehavior. School leaders argue that these suspensions ensure an orderly educational environment for those students who remain. Social science demonstrates the opposite. The practice of regularly suspending students negatively affects misbehaving students as well as innocent bystanders. All things being equal, schools that manage student behavior through means other than suspension produce the highest achieving students. In this respect, the quality of education a school provides is closely connected to its discipline policies.

Reformers have largely overlooked the connection between discipline and educational quality. This oversight has limited theoretical and practical tools for change. On the theoretical side, reformers miss the opportunity to pit harsh discipline as the enemy of good schools. Instead, they fall victim to the narrative of bad students as the enemy of good ones. On the practical side, they miss the opportunity to demand legal reform. Instead, they relegate themselves to asking schools to voluntarily adopt less severe discipline policies. Thus far, voluntary efforts have produced some significant changes, but the changes are isolated and limited in scope. In short, reformers need new legal theories and tools to demand reform. Otherwise, harsh discipline will remain the dominant paradigm for the foreseeable future and efforts to improve educational quality and achievement—the most pressing item on the national agenda of the day—will continue to fall short.

While some scholars have proposed limits on the most egregious discipline policies, this Article is the first to offer a legal theory that would substantively reform school discipline on the whole and improve educational quality. The theory is grounded in the affirmative education rights and duties found in state constitutions. These rights and duties give rise to two distinct but interrelated arguments. First, because students have a constitutionally protected individual right to education, suspensions and expulsions should trigger heightened scrutiny. Heightened scrutiny would not bar suspensions, but it would force states to justify the efficacy of suspension. The practical result would be to prompt states to adopt

pedagogically sound approaches to student misbehavior. Second, discipline practices that undermine educational quality violate states' constitutional obligation to provide equal and adequate educational opportunities to all students. In these instances, state constitutions should obligate states to intervene with reform. Unlike past strategies, these two steps can ensure discipline reform and educational quality improvements that normally prove elusive.

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INTRODUCTION

By short-term suspension or semester- and year-long expulsion, public schools exclude about three and a half million students a year.[1] Since the 1970s, many students' chances of exclusion have doubled and tripled.[2] Each African-American student who passes through the halls of a middle or high school in the fall has nearly a one-in-four chance of being suspended or expelled by the spring.[3] Some schools today will actually hand out more total suspensions than they have students, suspending some students multiple times.[4] This dramatic spike results from schools increasingly suspending and expelling students for relatively minor misbehavior. Today, less than ten percent of suspensions and expulsions are for weapons, violence, or drug-related behavior.[5] The rest are for misbehavior that in the past would have been dealt with informally. This represents a shift in discipline philosophy itself—from discipline responses designed to improve students' behavior to punitive responses that "demonstrate toughness and reassure the public that [school officials] are in control."[6]

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[1] U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION, DATA SNAPSHOT: SCHOOL DISCIPLINE 2 (2014), http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf [https://perma.cc/MH78-N72B].

[2] DANIEL LOSEN ET AL., CTR. FOR CIVIL RIGHTS REMEDIES, ARE WE CLOSING THE SCHOOL DISCIPLINE GAP? 6 (2015), https://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/AreWeClosingTheSchoolDisciplineGap_FINAL221.pdf [https://perma.cc/R2PH-2F24].

[3] *Id.*

[4] EVERY STUDENT EVERY DAY COAL., DISTRICT DISCIPLINE: THE OVERUSE OF SCHOOL SUSPENSION AND EXPULSION IN THE DISTRICT OF COLUMBIA 4 (2013), http://www.njjn.org/uploads/digital-library/DC_District-Discipline-Overuse-of-School-Suspension-and-Expulsion-in-DC_DCLY_2013.pdf [https://perma.cc/5ZVV-S5D7].

[5] *See, e.g.*, CONN. STATE DEP'T OF EDUC., SUSPENSIONS AND EXPULSIONS IN CONNECTICUT 33 (2015), http://www.sde.ct.gov/sde/lib/sde/pdf/deps/sctg/suspensions_and_expulsions_2015.pdf [https://perma.cc/6LX8-2J8B]; *see also* DANIEL J. LOSEN & TIA ELENA MARTINEZ, CTR. FOR CIVIL RIGHTS REMEDIES, OUT OF SCHOOL & OFF TRACK: THE OVERUSE OF SUSPENSIONS IN AMERICAN MIDDLE AND HIGH SCHOOLS 1, 20 (2013), https://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/out-of-school-and-off-track-the-overuse-of-suspensions-in-american-middle-and-high-schools/OutofSchool-OffTrack_UCLA_4-8.pdf [https://perma.cc/5U5C-U7GN] (reviewing national discipline data and finding that "most out-of-school suspensions are for minor offenses"). In some instances, drugs and weapons account for less than five percent of suspensions and expulsions. M. Karega Rausch & Russell Skiba, *Unplanned Outcomes: Suspensions and Expulsions in Indiana*, EDUC. POL'Y BRIEFS (Ctr. for Evaluation & Educ. Policy, Bloomington, Ind.), Summer 2004, at 2, http://files.eric.ed.gov/fulltext/ED488917.pdf [https://perma.cc/Q4FA-BRUG]; Arne Duncan, U.S. Sec'y of Educ., Rethinking School Discipline, Remarks at the Release of the Joint DOJ-ED School Discipline Guidance Package (Jan. 8, 2014), http://www.ed.gov/news/speeches/rethinking-school-discipline [https://perma.cc/7TZD-QPK7] (indicating as much as 95% of school exclusions are for nonviolent behavior).

[6] Pedro A. Noguera, *Preventing and Producing Violence: A Critical Analysis of Responses to School Violence*, 65 HARV. EDUC. REV. 189, 190 (1995).

This entails "rigid[ly] and inflexibl[y] . . . meting out punishment upon students who violate school rules," regardless of the infraction.[7]

The effects of this shift are far-reaching for both individual students and the overall education system. Data increasingly shows that the frequent use of suspension and expulsion to control student behavior creates a negative learning environment that incentivizes misbehavior and depresses overall academic achievement.[8] For the struggling student, punitive disciplinary environments may produce more misbehavior, not less.[9] When schools suspend or expel these students, the next step for a significant number will eventually be the juvenile justice system.[10] Moreover, the result is not to create a better learning environment for well-behaved students. To the contrary, punitive discipline undermines educational outcomes for well-behaved students as well.[11]

For the past decade, advocates, researchers, and a few policymakers have worked feverishly to end punitive discipline and slow the so-called school-to-prison pipeline.[12] The strategy has involved two steps. The first step has been to emphasize the staggering raw data on school suspensions and law enforcement referrals, hoping to shame schools into reform.[13] The second step emphasizes the availability of discipline models that help

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[7] *Id.*

[8] *See, e.g.*, M. KAREGA RAUSCH & RUSSELL J. SKIBA, THE ACADEMIC COST OF DISCIPLINE: THE RELATIONSHIP BETWEEN SUSPENSION/EXPULSION AND SCHOOL ACHIEVEMENT 19–20 (2005) (conducting two different regression analyses that showed that the use of "suspension and expulsion is negatively related to achievement, even when socio-demographic variables are held constant"); *see also infra* notes 248–75.

[9] *See infra* notes 261–65, 280–84.

[10] *See generally* Susan Ferriss, *Virginia Tops Nation in Sending Students to Cops, Courts: Where Does Your State Rank?*, THE CTR. FOR PUB. INTEGRITY (last updated Feb. 19, 2016) http://www.publicintegrity.org/2015/04/10/17089/virginia-tops-nation-sending-students-cops-courts-where-does-your-state-rank [https://perma.cc/LE97-4TB3] (reporting that nearly 16 in every 1000 Virginia students were referred to law enforcement).

[11] *See, e.g.*, Brea L. Perry & Edward W. Morris, *Suspending Progress: Collateral Consequences of Exclusionary Punishment in Public Schools*, 79 AM. SOC. REV. 1067, 1068 (2014); RAUSCH & SKIBA, *supra* note 8, at 19.

[12] *See, e.g.*, JUDITH A. BROWNE, ADVANCEMENT PROJECT, DERAILED!: THE SCHOOLHOUSE TO JAILHOUSE TRACK 30 (2003) (calling on schools to reduce harsh discipline policies and referrals to law enforcement); LOSEN ET AL., *supra* note 2, at 34 (calling on schools to close the discipline gap); Motoko Rich, *Obama to Report Widening of Initiative for Black and Latino Boys: My Brother's Keeper Program Grows to Include More Impoverished Minorities*, N.Y. TIMES (July 20, 2014), http://www.nytimes.com/2014/07/21/education/obamas-my-brothers-keeper-education-program-expanded.html?_r=1 [https://perma.cc/C6C2-S5MR] (describing presidential initiative to improve life outcomes for African-American and Latino boys, including by improving discipline policies).

[13] For instance, after a national study identified Oklahoma City public schools as among the very worst in the nation in terms of suspension rates, the district immediately responded with an audit of its discipline data and a promise to implement reform. Ben Felder, *OKC School Suspension Rates Are Among Highest in the Nation*, OKLA. GAZETTE (Mar. 4, 2015), http://okgazette.com/2015/03/04/okc-school-suspension-rates-are-among-highest-in-the-nation/ [https://perma.cc/U6E4-XJWD].

students make better decisions and avoid misbehavior in the first instance, trusting that conscientious schools will adopt best practices.[14] While these efforts have achieved promising results in several locations,[15] positive results remain isolated and harsh discipline remains dominant.[16]

The inability of reformers to identify a legal basis to demand meaningful change in court has slowed progress. While existing precedent clearly protects students' right to certain procedures prior to punishment,[17] it has done very little to force schools to rethink the basic justifications for suspending and expelling students.[18] Currently, reformers' primary option is to pursue administrative remedies with the U.S. Department of Education. Administrative remedies, however, are limited in scope. In 2014, the Department announced a new discipline policy, but the Department only has authority to limit egregious racial disparities in school discipline, not punitive discipline in general.[19] Equally problematic, the new policy is subject to discretionary underenforcement and retraction at any time.

Recognizing the need for legal remedies, scholars have theorized constitutional limits on the most egregious forms of school discipline and zero tolerance.[20] But no one has articulated a broad legal theory for holistically reforming school discipline or connecting discipline policies to education quality. This Article offers that theory, challenging school exclusions and negative educational environments based on the rights and

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[14] For a full discussion of the tools states and schools might adopt to improve discipline outcomes, see Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313 (2016).

[15] *See, e.g.*, Teresa Watanabe, *LAUSD to Decriminalize Student Fights, Petty Thefts and Minor Offenses*, L.A. TIMES (Aug. 19, 2014, 7:52 AM), http://www.latimes.com/local/lanow/la-me-ln-lausd-to-decriminalize-student-fights-petty-thefts-minor-offenses-20140819-story.html [https://perma.cc/J874-TLR6]; Tom Mela, *How We Won School Discipline Reform in Massachusetts*, NAT'L OPPORTUNITY TO LEARN CAMPAIGN (July 23, 2014), http://www.otlcampaign.org/blog/2014/07/23/how-we-won-school-discipline-reform-massachusetts [https://perma.cc/258G-HEJK].

[16] *See, e.g.*, Derek Black, *California Limits School Suspensions: Did It Do Enough?*, EDUC. L. PROF. BLOG (Oct. 1, 2014), http://lawprofessors.typepad.com/education_law/2014/10/california-limits-school-suspensions-did-it-do-enough.html [https://perma.cc/V55D-6RSA].

[17] Goss v. Lopez, 419 U.S. 565, 584 (1975).

[18] Derek W. Black, *The Constitutional Limit of Zero Tolerance in Schools*, 99 MINN. L. REV. 823, 841–66 (2015) (explaining how U.S. Supreme Court precedent fell far short of its intended result of reforming school discipline).

[19] U.S. Dep't of Justice & U.S. Dep't of Educ., Dear Colleague Letter on Nondiscriminatory Administration of School Discipline 11–12 (Jan. 8, 2014), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf [https://perma.cc/HHA7-RWUU].

[20] *See, e.g.*, Black, *supra* note 18, at 828; Eric Blumenson & Eva S. Nilsen, *One Strike and You're Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L.Q. 65, 108 (2003); Aaron Sussman, *Learning in Lockdown: School Police, Race, and the Limits of Law*, 59 UCLA L. REV. 788, 831–35 (2012); Robyn K. Bitner, Note, *Exiled from Education:* Plyler v. Doe*'s Impact on the Constitutionality of Long-Term Suspensions and Expulsions*, 101 VA. L. REV. 763, 767 (2015).

duties that grow out of education clauses found in state constitutions.[21] These rights and duties give rise to two distinct, but interrelated claims. One claim is based on an excluded student's individual right to education. The other is based on states' general duty to provide equal and adequate educational opportunities.[22]

The first claim posits that suspensions and expulsions should trigger heightened scrutiny. Over the past forty years, the right to education has changed substantially. Initially, courts treated education as a statutory right, subject to no more than rational basis review under federal law. Now, education has achieved a constitutional status under state law, with courts recognizing education as a constitutional right of students or a constitutional duty of states and requiring school funding and quality reforms in more than half of the states.[23] This precedent supports the proposition that students have an individual constitutional right to education under state constitutions that schools cannot simply take away without meeting some form of heightened scrutiny.[24] Heightened scrutiny would require an important or compelling reason for taking that right away, along with a showing that suspension and expulsion are substantially related or narrowly tailored to achieving those goals.[25] With serious misbehaviors, schools could easily meet this standard in most circumstances, leaving current practices in place.[26] But schools' unfettered

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[21] *See generally* Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1500–05 (2007) (discussing the results in state cases and the substantive meaning of the constitutional right to education in those cases); William E. Thro, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1666 (1989) (providing an overview of the various education clauses in state constitutions).

[22] Some states recognize a right to an equal and an adequate education, while others recognize a right to only one or the other. For the purposes of this Article, those distinctions are unimportant and, thus, this Article uses the phrase adequate and equal education for ease and readability. For more on the unimportance of this distinction, see Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477 (2014).

[23] Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1397 (2010).

[24] *See, e.g.*, Leandro v. State, 488 S.E.2d 249, 255–56 (N.C. 1997); Sch. Dist. of Wilkinsburg v. Wilkinsburg Educ. Ass'n, 667 A.2d 5, 9 (Pa. 1995); Scott v. Commonwealth, 443 S.E.2d 138, 142 (Va. 1994); Brigham v. State, 692 A.2d 384, 391–95 (Vt. 1997). This Article uses the phrase "heightened scrutiny" to refer to strict and intermediate scrutiny collectively. While strict scrutiny is the general default for violations of fundamental and other constitutional rights, courts do not uniformly apply it in all instances.

[25] *See, e.g.*, Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1976); Cathe A. v. Doddridge Cty. Bd. of Educ., 490 S.E.2d 340, 346–47 (W. Va. 1997) (quoting Phillip Leon M. v. Greenbrier Cty. Bd. of Educ., 484 S.E.2d 909, 918 (W. Va. 1996) (McHugh, J., concurring in part and dissenting in part)).

[26] *See generally* King *ex rel.* Harvey-Barrow v. Beaufort Cty. Bd. of Educ., 704 S.E.2d 259 (N.C. 2010) (discussing how strict school discipline policy would pass rational basis, intermediate, and strict scrutiny review).

authority to remove students for misbehavior as minor as class disruption would be severely restricted.

The individualized rights claim, however, might only serve to bring suspension rates down. It would not necessarily ensure substantive educational and disciplinary reform that improves educational outcomes for everyone; a school could just stop suspending students and do nothing to improve the disciplinary environment. This could partially salvage the education of some students, but undermine the education of others. To ensure broader reforms, disciplinary theories must also incorporate states' systematic constitutional duties in education—the basis for the second claim type.

The second claim posits that discipline policies and practices that significantly undermine the quality of education a school offers violate the state's constitutional education duty. State constitutions obligate states to provide equal and adequate educational opportunities to all students.[27] Empirical evidence indicates that schools cannot consistently deliver equal and adequate education opportunities without also ensuring effective discipline policy.[28] Dysfunctional disciplinary environments deprive all students, including well-behaved students, of access to equal and adequate educational opportunities. When this occurs, state education clauses obligate states to intervene with reforms that improve discipline and, thereby, the quality of education.

This second claim has greater potential to transform the debate over school discipline. Too often the current debate pits "good" students against "bad" ones.[29] The interests of good students will almost always win this battle, which means schools will continue to single out "bad" students and set them on the schoolhouse-to-jailhouse path. This framing, however, incorrectly assumes that misbehaving students' interests are adverse to everyone else's interests. This Article reframes the debate by focusing on the close connection between educational quality and discipline policy. By emphasizing how punitive discipline undermines educational quality in

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[27] Rebell, *supra* note 21, at 1515.

[28] *See infra* notes 249–76, 320–49.

[29] *See, e.g.*, Ben Wolfgang, *Obama Administration Guidelines Could Lead to Racial Quotas in School Discipline*, WASH. TIMES (Jan. 8, 2014), http://www.washingtontimes.com/news/2014/jan/8/white-house-to-offer-new-rules-school-discipline/ [https://perma.cc/Y7PX-KA6S] (addressing the concern that new suspension guidelines will cause administrators to overlook bad behavior by minorities); Teresa Watanabe & Howard Blume, *Why Some LAUSD Teachers Are Balking at a New Approach to Discipline Problems*, L.A. TIMES (Nov. 7, 2015), http://www.latimes.com/local/education/la-me-school-discipline-20151108-story.html [https://perma.cc/9RKF-KGA6] (indicating that some teachers believe the new approach to discipline is preventing them from disciplining students who need it).

general, this Article targets punitive discipline as the enemy of quality educational opportunities and, thus, the interests of all students. With that framing, non-punitive approaches to discipline that emphasize positive reinforcement for appropriate behavior and early individualized interventions for students showing signs of misbehavior become a strategy to improve overall educational outcomes.

This Article develops this argument in three parts. Part I outlines the historical development of the state constitutional right to education and states' duty to deliver it, including the theoretical and doctrinal principles developed in past litigation. Of particular importance is courts' recognition that academic outcomes depend on two factors: students' individual capabilities and disadvantages, and schools' responses to them. The state may not be able to control the former, but it is entirely responsible for the latter. Thus, when students systemically fail to succeed in school, courts have rejected states' attempts to blame students—or even local school personnel—and reasoned that the state has a responsibility to offer students the support necessary to succeed.[30]

Part II examines the few cases that have attempted to use school finance precedent in the context of school discipline and identifies the flaws in that litigation. Overall, these cases are a story of bad facts making bad law. Rather than challenging suspensions for minor misbehavior, plaintiffs in these cases have sought access to alternative schools for students who engaged in serious misbehavior.[31] In this context, courts have either avoided or misunderstood the central questions of whether education is a constitutional right and what justifications suffice for taking it away. Part II ends with answers to those questions and outlines the appropriate framework for bringing and adjudicating claims on behalf of suspended and expelled students. In particular, it argues that the most compelling case on behalf of students has yet to be made: states lack a sufficient justification to exclude students from regular school for extended periods of time when all they have done is engage in minor misbehavior.

Part III shifts from individual rights analysis to the state's duty to deliver adequate and equal education opportunities for all students. First, it establishes the factual predicate that discipline policy affects educational

[30] Abbott v. Burke (*Abbott II*), 575 A.2d 359, 403 (N.J. 1990); Hoke Cty. Bd. of Educ. v. State, 599 S.E.2d 365, 390–91 (N.C. 2004) (indicating state had failed to identify and support at-risk students); Abbeville Cty. Sch. Dist. v. State, 767 S.E.2d 157, 179 (S.C. 2014) (emphasizing the need to address the current reality in which the state "creat[es] school districts filled with students of the most disadvantaged socioeconomic background, exposing students in those school districts to substandard educational inputs, and then maintaining that nothing can be done to improve those school districts' unacceptable performances").

[31] *See, e.g.*, *King*, 704 S.E.2d at 260; *In re* T.H., III, 681 So. 2d 110, 115–17 (Miss. 1996).

opportunity. It does so through social science studies finding a statistical correlation between discipline policy, educational quality, and student achievement. Those studies establish that: (1) negative school climates incentivize more misbehavior;[32] (2) the discipline decisions school officials make shape school climate; and (3) school climate affects student achievement and largely explains the achievement gap between students at predominantly low-income school and middle-income schools.[33] Part III situates these findings within school quality and finance precedent, arguing that states have an affirmative obligation to reform discipline policy and improve disciplinary environments. Part III ends by briefly comparing the individual rights approach to discipline to the duty-based approach. It concludes that a duty-based claim is the strongest of the two, but that the claims should be jointly pursued.

I. THE CONSTITUTIONAL RIGHT TO EDUCATION

A. Historical Evolution

In 1954 in *Brown v. Board of Education*,[34] the U.S. Supreme Court wrote that "education is perhaps the most important function of state and local governments . . . [and] it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[35] Yet, the Court refrained from recognizing education as a fundamental right.[36] When that issue was squarely before the Court nearly two decades later in *San Antonio Independent School District v. Rodriguez*,[37] the Court held that education is not a fundamental right, and poverty-based discrimination in education is only subject to rational basis review.[38] With this defeat, advocates abandoned federal courts as a venue for school finance litigation claims arguing that inequities in education resources and quality violated students' constitutional rights. Instead, advocates brought future claims exclusively in state courts.[39]

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[32] *See infra* notes 262–66.

[33] *See, e.g.*, Richard Arum & Melissa Velez, *Class and Racial Differences in U.S. School Disciplinary Environments*, *in* IMPROVING LEARNING ENVIRONMENTS: SCHOOL DISCIPLINE AND STUDENT ACHIEVEMENT IN COMPARATIVE PERSPECTIVE 298–302 (Richard Arum & Melissa Velez eds., 2012).

[34] 347 U.S. 483 (1954).

[35] *Id.* at 493.

[36] *Id.* (indicating equality applies only "where the state has undertaken to provide [education]").

[37] 411 U.S. 1 (1973).

[38] *Id.* at 28–29, 35.

[39] Black, *supra* note 23, at 1360–61.

The state claims were theoretically and factually the same as those in *Rodriguez*, but differed in one key aspect: the state claims were based on education clauses in state constitutions.[40] In contrast to the federal Constitution's silence on education, state constitutions affirmatively obligate states to do certain things, the most important of which is to deliver education.[41] In fact, all fifty state constitutions specifically mandate that the state establish and maintain public schools.[42]

Litigation based on these education clauses succeeded immediately. In 1973, just weeks after the U.S. Supreme Court decided *Rodriguez*, the Supreme Court of New Jersey held that funding inequities violated students' state constitutional right to a "thorough and efficient" education.[43] Three years later, the Supreme Court of California held that the California Constitution guarantees a fundamental right to education and that funding inequities violated that right.[44] Over the next decade, courts in several other states followed with similar holdings.[45]

In the 1980s, school finance litigation began to focus more heavily on quality and less on formal equity.[46] Some began to question the potential limits of equity theory and noted that many state constitutions contained rich language that spoke to the quality of education.[47] During this same period, "standards-based reform" was occurring in education policy, which

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[40] *See generally* Thro, *supra* note 21, at 1657–70 (describing state education clauses and their role in litigation).

[41] *Id.* at 1667–68 ("By their texts, the Category IV clauses impose the greatest obligation on the state legislature. Typically, they provide that education is 'fundamental,' 'primary,' or 'paramount.'").

[42] The official number of state constitutions imposing an education duty or right has varied between forty-nine and fifty over the past half-century based on Mississippi's constitutional vacillations. The Mississippi Constitution of 1890 imposed upon the state to establish a uniform system of public schools, but that obligation was erased from the constitution in 1960 as a reaction to *Brown v. Board of Education*. Hon. Michael P. Mills & William Quin, II, *The Right to a "Minimally Adequate Education" as Guaranteed by the Mississippi Constitution*, 61 ALB. L. REV. 1521, 1525–26 (1998); *see also* T.H. Freeland, III et al., *Seeking Educational Funding Equity in Mississippi: "I Asked for Water, You Gave Me Gasoline,"* 58 MISS. L.J. 247, 258–59 (1988). In 1987, Mississippi amended its constitution again in a way that could be read to reestablish a duty on the state. MISS. CONST. art. VIII, § 201 ("The Legislature shall, by general law, provide for the establishment, maintenance and support of free public schools upon such conditions and limitations as the Legislature may prescribe.").

[43] Robinson v. Cahill, 303 A.2d 273, 294–95 (N.J. 1973), *reheard as to remedy*, 351 A.2d 713 (N.J. 1975).

[44] Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1976) (clarifying and reaffirming its pre-*Rodriguez* holding).

[45] *See* DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 93 (Ark. 1983); Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 95 (Wash. 1978); Washakie Cty. Sch. Dist. No. One v. Herschler, 606 P.2d 310, 333 (Wyo. 1980).

[46] Paul A. Minorini & Stephen D. Sugarman, *School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future*, *in* EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 34, 53–56 (Helen F. Ladd et al. eds., 1999).

[47] *Id.*

lent support to the notion that states should improve basic quality in education.[48] Prompted by reports, national summits, and popular media charging that students in the United States were not mastering core educational concepts and were falling behind their international counterparts, states began developing core academic standards that all students would be required to meet.[49]

Those academic standards and students' scores on tests of those standards soon found their way into plaintiffs' legal claims. Plaintiffs argued that state constitutional phrases such as "efficient," "thorough," and "sound basic" education obligated states to provide children with a quality education that could be measured through the academic standards and tests that states had developed.[50] For instance, in *Rose v. Council for Better Education, Inc.*,[51] the Kentucky Supreme Court became the first to fully articulate a qualitative right to education, holding that a constitutionally adequate or "efficient" education included several specific skills and outcomes in each of the major subjects of school curriculum.[52] Numerous other state courts borrowed from *Rose*'s standards or followed *Rose*'s approach in defining their own.[53] With these litigation successes and the continued emphasis on standards-based learning, quality-based litigation quickly became, and has since remained, a dominant theory in constitutional education litigation.[54]

Equity litigation, however, did not abruptly end. Instead, the lines between "equity" and "adequacy" litigation have increasingly blurred in recent decades.[55] Litigants now often include both theories in their claims.[56]

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[48] Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 555–63 (1992) (describing the perceived crisis in academic standards in public schools and the effort to reform them).

[49] Joetta L. Sack, *The End of an Education Presidency*, EDUC. WK., Jan. 17, 2001.

[50] Minorini & Sugarman, *supra* note 46, at 52.

[51] 790 S.W.2d 186 (Ky. 1989).

[52] *Id.* at 212.

[53] *See, e.g.*, Opinion of the Justices, 624 So. 2d 107, 165–66 (Ala. 1993); Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 485 (Ark. 2002), *mandate recalled by* 142 S.W.3d 643 (Ark. 2004); Idaho Schs. for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 734 (Idaho 1993); McDuffy v. Sec'y of Exec. Office of Educ., 615 N.E.2d 516, 554 (Mass. 1993); Claremont Sch. Dist. v. Governor (*Claremont II*), 703 A.2d 1353, 1359 (N.H. 1997*)*; Leandro v. State, 488 S.E.2d 249, 255 (N.C. 1997); Abbeville Cty. Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999).

[54] *See, e.g.*, Complaint at ¶ 17, Shelby Cty. Bd. of Educ. v. Haslam, (Tenn. Ch. Aug. 31, 2015) (No. 15-1048III); Abbeville Cty. Sch. Dist. v. State, 767 S.E.2d 157 (S.C. 2014).

[55] William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-Examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1187–88, 1283–96 (2003) (explaining that no clear line divides equality theories from adequacy theories and that, in fact, both theories are present in most education finance cases); Weishart, *supra* note 22, at 478–81.

Moreover, while the terms adequate, equal, and quality education are theoretically distinct, scholars have demonstrated that the functional differences between these phrases are not that significant.[57] The factual circumstances that would support a violation of any of these rights are generally the same.[58] Even where some functional differences might exist, they are not pertinent to this Article's arguments. The main point for this Article is simply to highlight the litigation success that followed the advent of adequacy theories. *Rose* marked the beginning of twenty-seven school finance cases—most of them premised on adequacy—that would be filed between 1989 and 2006.[59] Plaintiffs prevailed in nearly 75% of those cases, as compared to the less than 50% success rate prior to *Rose*.[60] While school finance litigation took a brief respite during the Great Recession, numerous cases have been filed in the last few years.[61]

B. Doctrinal and Theoretical Principles

1. The Creation of Rights and Duties.—Several important ideas and principles developed in school finance litigation have direct bearing on school discipline. The most obvious is that a majority of state courts have held that education clauses in state constitutions create rights or duties.[62] Some courts ask whether education is a fundamental right and, if so, apply strict scrutiny to state policies and practices that create unequal access to educational opportunity.[63] Other courts ask whether the state constitution obligates the legislature to ensure certain educational opportunities and, if so, whether the state has carried out that duty.[64] For the purposes of this

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[56] *See, e.g.*, Montoy v. State, 138 P.3d 755, 764 (Kan. 2006) (addressing both equity and adequacy concerns).

[57] Weishart, *supra* note 22, at 482.

[58] *Id*.

[59] Rebell, *supra* note 21, at 1527.

[60] *Id.*

[61] *See, e.g.*, Dwyer v. State, 357 P.3d 185 (Colo. 2015); Lobato v. State, 304 P.3d 1132, 1144 (Colo. 2013); Woonsocket Sch. Comm. v. Chafee, 89 A.3d 778, 793–94 (R.I. 2014); Morath v. Texas Taxpayer & Student Fairness Coal., 490 S.W.3d 826, 850–54 (Tex. 2016).

[62] *See* Julia A. Simon-Kerr & Robynn K. Sturm, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 STAN. J. CIV. RTS. & CIV. LIBERTIES 83, 89–95 (2010) (surveying outcomes in school finance litigation).

[63] *See, e.g.*, Serrano v. Priest, 557 P.2d 929, 948–50 (Cal. 1976), *supplemented*, 569 P.2d 1303 (Cal. 1977); Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979).

[64] *See, e.g.*, Campaign for Fiscal Equity, Inc. v. State (*CFE I*), 655 N.E.2d 661, 667 (N.Y. 1995) (determining whether "State's public school financing system effectively fails to provide for a minimally adequate educational opportunity"); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 200 (Ky. 1989) ("The subject matter of this lawsuit is whether the General Assembly has complied with its constitutional duty to provide an 'efficient' system of common schools in Kentucky."). North Carolina, interestingly, blends the fundamental rights analysis with the duty analysis, finding that

Article, the important point is that, regardless of the theory, these courts have held that students can enforce education clauses in state constitutions against the state. Even when courts have refused to enforce a state's education clause, the courts have not gone so far as to suggest the education clause is irrelevant to the delivery of educational opportunity or that the state is free to disregard it.[65] Rather, these courts have reasoned that while the state constitution may obligate the state to deliver certain educational opportunities, the specific language in an education clause or the state's system of separation of powers affords the state legislature broad discretion in carrying out its education duty.[66] On this basis, these courts find that they lack the authority to second-guess the legislature.[67] In short, all state constitutions establish education duties and rights. The difference between states is the extent to which courts have been willing to enforce those duties and rights to prevent deprivations of educational opportunity. Most have been willing to do so.

2. Ensuring Equal and Adequate Education.—Depending on the particular state, the precise right at stake in school finance cases is the right to equal or adequate educational opportunities.[68] Money often takes center stage only because it substantially affects educational opportunity in general and those critical inputs that make educational opportunity meaningful. While money is highly relevant in accessing educational opportunities, it is not singularly determinative of whether the state has provided an adequate or equal education. Courts often spend just as much, if not more, time addressing substantive issues relating to the effect of teachers, facilities, transportation, and class sizes on educational opportunity.[69] In each of these areas, the general inquiry is whether the state policies and practices provide students with learning opportunities and

students have a fundamental right to sound basic education. Hoke Cty. Bd. of Educ. v. State, 599 S.E.2d 365, 373 (N.C. 2004).

[65] Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1137 (Mass. 2005) (Marshall, C.J., concurring); *Ex parte* James, 836 So. 2d 813, 815 (Ala. 2002).

[66] *See, e.g.*, Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005, 1017–18 (Colo. 1982) (en banc); McDaniel v. Thomas, 285 S.E.2d 156, 164 (Ga. 1981); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1185, 1189 (Ill. 1996).

[67] *See generally* Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701, 714–15 (2010) (discussing judicial outcomes and finding that one-third dismiss school finance cases based on separation of powers concerns).

[68] *Compare Rose*, 790 S.W.2d at 215 (focusing on adequacy), *with Serrano*, 557 P.2d at 957–58 (focusing on whether student subgroups had been treated equally).

[69] Abbeville Cty. Sch. Dist. v. State, 767 S.E.2d 157, 169–73 (S.C. 2014) (examining transportation, teachers, and district size); Campaign for Fiscal Equity, Inc. v. State (*CFE II*), 801 N.E.2d 326, 333–36 (N.Y. 2003) (evaluating teachers, facilities, and the instrumentalities of learning).

resources that are likely or reasonably calculated to produce educational success for students, which is typically measured through proficiency levels on end-of-grade standardized tests, graduation rates, and preparedness for higher education, employment, and the responsibilities of citizenship.[70] In short, the precise legal challenge in most cases is based on the theory that the state must ensure that existing educational inputs and opportunities are sufficient to produce academic success.

3. States Must Meet the Unique Needs of Disadvantaged Students and Districts.—In general, the state's obligation is to ensure all students have the opportunity to succeed in school.[71] However, students from various demographic groups—including but not limited to low-income students, English Language Learners, students with disabilities, and racial minorities—often face unique challenges or barriers to academic achievement.[72] Courts have held that states have a duty to implement policies and provide the resources necessary to address those challenges.[73] As the court in *Abbott v. Burke*[74] wrote, "If the claim is that these students simply cannot make it, the constitutional answer is, give them a chance."[75] Even if the state cannot eliminate students' challenges, "students are constitutionally entitled to that help," and "in some cases for disadvantaged students to receive a thorough and efficient education, the students will require above-average access to education resources."[76]

A state's education system and its particular policies may be very effective in serving the needs of some students and districts, but ineffective

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[70] *See, e.g.*, Hoke Cty. Bd. of Educ. v. State, 599 S.E.2d 365, 381 (N.C. 2004) (stating that, consistent with the court's early opinion, plaintiffs presented evidence of "(1) comparative standardized test score data; [and] (2) student graduation rates, employment potential, post-secondary education success (and/or lack thereof)"); Robinson v. Cahill, 303 A.2d 273, 294–95 (N.J. 1973), *aff'd as modified on reargument*, 306 A.2d 65 (N.J. 1973), *and on reh'g*, 351 A.2d 713 (N.J. 1975) (stating that the education clause's "purpose was to impose on the legislature a duty of providing for a thorough and efficient system of free schools, capable of affording to every child such instruction as is necessary to fit it for the ordinary duties of citizenship"); Campaign for Fiscal Equity, Inc. v. State, 719 N.Y.S.2d 475, 517 (N.Y. Sup. Ct. 2001) (examining student test scores and graduation rates).

[71] *See, e.g.*, *CFE II*, 801 N.E.2d at 337 (quoting *Campaign for Fiscal Equity*, 719 N.Y.S.2d at 517) (stating that a sound basic education "must still 'be placed within reach of all students,' including those who 'present with socioeconomic deficits'").

[72] *Hoke Cty. Bd. of Educ.*, 599 S.E.2d at 389 n.16 (defining the at-risk students whom the state was obligated to assist).

[73] *Id.* at 390–91 (indicating state had failed to identify and support at-risk students); *Abbeville Cty. Sch. Dist.*, 767 S.E.2d at 179 (emphasizing the need to address "school districts filled with students of the most disadvantaged socioeconomic background, exposing students in those school districts to substandard educational inputs" and rejecting the state's argument "that nothing can be done to improve those school districts' unacceptable performances").

[74] *Abbott II*, 575 A.2d 359 (N.J. 1990).

[75] *Id.* at 403.

[76] *Id.* at 402 (quoting Abbott v. Burke (*Abbott I*), 495 A.2d 376, 388 (N.J. 1985)).

in serving others. For instance, a financing system that relies heavily on local property tax will generate more than sufficient funds to deliver a quality education in most metropolitan suburbs, but will be insufficient in rural areas or impoverished inner-city neighborhoods.[77] Likewise, a state standard that requires that students develop the ability to read short books independently by the end of the first grade might be reasonable for a substantial portion of students, but is highly unlikely for a substantial portion of disadvantaged students unless the education system intervenes with additional supports for those students.[78] Moreover, the gap in learning outcomes between disadvantaged students and others will only expand over time in the absence of early and continued supports.[79]

Based on evidence of this sort, courts have forced states to intervene in particular districts and on behalf of particular student groups, reasoning that these students' ability to obtain equal or adequate education opportunities rests on these interventions. In other words, states have an obligation to ensure that their education policies and practices—even if good in theory or effective for most students—work for those students who are most in need. Addressing the needs of these students has been the driving inquiry of most all school finance litigation.

4. *Any Policies that Interfere with the Delivery of Equal and Adequate Education Are Subject to Challenges.*—Because the right at stake in these cases is an adequate or equal education, not adequate or equal money, the right is sufficiently flexible to encompass any number of educational policies that affect educational opportunity.[80] Not only has the litigation encompassed those obvious things like teachers and buildings that money can buy, it has encompassed things that money cannot buy. For instance, plaintiffs in *Sheff v. O'Neill*[81] successfully demonstrated that school district boundaries caused segregation and that segregation was a

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[77] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (comparing funding available in Alamo Heights to Edgewood); *see generally* Bruce J. Biddle & David C. Berliner, *Unequal School Funding in the United States*, 59 EDUC. LEADERSHIP 48 (2002) (providing an overview of traditional school funding practices and the inequalities they produce).

[78] *See generally* Farah Z. Ahmad & Katie Hamm, *The School-Readiness Gap and Preschool Benefits for Children of Color*, CTR. FOR AM. PROGRESS (Nov. 12, 2013), https://www.americanprogress.org/issues/education/report/2013/11/12/79252/the-school-readiness-gap-and-preschool-benefits-for-children-of-color/ [https://perma.cc/LZH6-2BJN] (discussing the school readiness gap between certain demographic groups and their different language and reading levels).

[79] *See generally* Roland G. Fryer & Steven D. Levitt, *Falling Behind: As Children Move Through School, the Black-White Achievement Gap Expands*, 4 EDUC. NEXT 64 (2004).

[80] James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 308–10 (1999); Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 390–403 (2012) (discussing the potential breadth of constitutional rights to education).

[81] 678 A.2d 1267 (Conn. 1996).

cause of educational inequality in the state.[82] Thus, the court held that rigidly segregated school districts deprived students of their right to equal education opportunity.[83]

More recently, litigants in other states have used theories of adequacy and equity to challenge teacher and charter school policies. A trial court in California held that teacher tenure and seniority that keep grossly ineffective teachers in the classroom deprive students of their fundamental right to education under the California Constitution.[84] Litigants in Massachusetts have employed a similar strategy in challenging the state's cap on the number of charters.[85] They argue that the cap deprives students of a constitutionally sufficient education because it prevents them from exiting their constitutionally deficient traditional public schools for better charter schools.[86] While the courts have yet to rule there, the claim has helped generate legislative discussion regarding lifting the cap.[87]

Regardless of the final resolution of these newer cases, they demonstrate the breadth of circumstances to which the constitutional right to an equal or adequate education might apply. Any state policy substantially impairing educational opportunity is potentially subject to constitutional challenge. Plaintiffs' primary hurdle is not at the theoretical level of whether constitutional rights to education limit some particular type of education policy regarding teachers, financing, segregation, or discipline, but in making the factual showing that the policy or practice in question—whatever it might be—is the actual cause of substantial and systematic injury to students.

5. *The Ultimate Responsibility for Educational Opportunities Rests with the State.*—The foregoing principles rest on one final

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[82] *Id.* at 1270–71.

[83] *Id.* at 1288–89.

[84] Vergara v. State, No. BC484642, 2014 WL 6478415, at *3 (Cal. Sup. Ct. Aug. 27, 2014), *rev'd*, 202 Cal. Rptr. 3d 262 (Cal. Ct. App. 2016), *as modified*, 2016 WL 4443590 (Cal. Ct. App. May 3, 2016), *reh'g denied*, 2016 WL 4443590 (Cal. Ct. App. Aug. 22, 2016); Verified Amended Complaint at ¶7, Davids v. State, No. 201415-A-043 (N.Y. Sup. Ct. June 30, 2014); *see also* Order Denying Motion to Dismiss, Davids v. State, No. 201415-A-043 (N.Y. Sup. Ct. Mar. 12, 2015), http://lawprofessors.typepad.com/files/2015-march-motion-to-dismiss-denied--a-043---davids-wright.pdf [https://perma.cc/G66R-22BL] (New York case surviving motion to dismiss).

[85] Derek Black, *New Lawsuit Claims Cap on Charter Schools Is Unconstitutional*, EDUC. L. PROF. BLOG (Mar. 17, 2015), http://lawprofessors.typepad.com/education_law/2015/03/new-lawsuit-claims-cap-on-charter-schools-is-unconstitutional-.html [https://perma.cc/GKQ7-NPA7].

[86] *Id.*

[87] Nina Rees, *Too Much Left to Chance: States with Charter School Caps Should Stop Abandoning Students to the Whims of a Lottery*, U.S. NEWS (Apr. 8, 2015, 9:00 AM), http://www.usnews.com/opinion/knowledge-bank/2015/04/08/massachusetts-should-lift-charter-school-cap [https://perma.cc/9PGP-RWRQ] (discussing Massachusetts Governor's calls to lift the cap).

foundational principle: the state is ultimately responsible for the educational opportunities that students do and do not receive.[88] While variations in educational opportunity and students' academic achievement may be random in some respects, the state has the responsibility to monitor educational opportunity and intervene to address policies and practices that interfere with students' ability to receive an equal or quality education.[89] On this basis, courts have forced states to correct problems occurring at the local level.[90]

For decades, states left local districts to their own devices in funding and determining the academic rigor in schools.[91] When certain districts produced poor academic outcomes, the state blamed school districts and/or the students.[92] According to the state, school districts were mismanaged or their students faced too many personal challenges.[93] Either way, academic failure was not the state's fault. This, moreover, was the price of local autonomy, which states claimed was an important goal to pursue.[94]

School finance litigation eliminated these defenses. The responsibility for academic success and the school funding necessary to deliver it now falls primarily on the state.[95] As the court in *Rose* explained:

> The sole responsibility for providing the system of common schools is that of our General Assembly. It is a duty—it is a constitutional mandate placed by the people on the 138 members of that body who represent those selfsame people.
>
> The General Assembly must not only establish the system, but it must monitor it on a continuing basis so that it will always be maintained in a constitutional

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[88] *See, e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 216 (Ky. 1989) ("[T]he *sole responsibility* for providing the system of common schools lies with the General Assembly." (emphasis in original)); Opinion of the Justices (Reformed Pub. Sch. Fin. Sys.), 765 A.2d 673, 676 (N.H. 2000) ("The State may not shift any of this constitutional responsibility to local communities. . . .").

[89] *Rose*, 790 S.W.2d at 211.

[90] *Id.*

[91] Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773, 781 (1992).

[92] *Abbott II*, 575 A.2d 359, 398 (N.J. 1990) ("The State contends that the education currently offered in these poorer urban districts is tailored to the students' present need, that these students simply cannot now benefit from the kind of vastly superior course offerings found in the richer districts."); *Abbott I*, 495 A.2d 376, 384–86 (N.J. 1985) (blaming local mismanagement); Abbeville Cty. Sch. Dist. v. State, 767 S.E.2d 157, 179 (S.C. 2014) (noting the state's position that "nothing can be done to improve those [high poverty] school districts' unacceptable performances").

[93] *See, e.g.*, cases cited *supra* note 92.

[94] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49–50 (1973).

[95] *Rose*, 790 S.W.2d at 216; *Abbott II*, 575 A.2d at 408–10 (imposing duty on the state to fund education, notwithstanding its claims of local mismanagement).

> manner. The General Assembly must carefully supervise it, so that there is no waste, no duplication, no mismanagement, at any level.[96]

Thus, more practically, if some local districts lack the funding to deliver a quality education, the state has the duty to supplement those districts or come up with a new statewide funding scheme.[97] If districts cannot hire or retain the quality teachers necessary to ensure effective instruction and learning, the state has the responsibility to take the steps necessary to improve teacher quality.[98] If local districts waste the resources the state gives them to hire quality teachers and help develop existing ones, the state has the responsibility to stop this waste.[99] In short, states cannot avoid their constitutional obligation to ensure appropriate educational opportunities by pointing to the failures of local school leaders or the extraordinary disadvantages their students face outside school.

C. Implications for School Discipline Reform

In the context of the foregoing principles, suspensions and expulsions raise constitutional concerns well beyond the basic procedural due process rules that courts have traditionally applied.[100] First, when a student is removed from school, the student is not just losing access to some statutory benefit that the state is free to condition or limit. Rather, the student is losing access to a constitutional right or an opportunity that the state is constitutionally obligated to deliver. This should trigger heightened scrutiny, which requires more important and more carefully thought-out justifications for school exclusions than schools have currently offered. Second, where discipline policy affects the overall quality of education and academic outcomes in school,[101] the constitutional right to education can

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[96] *Rose*, 790 S.W.2d at 211.

[97] *Abbott II*, 575 A.2d at 408–10; Campaign for Fiscal Equity, Inc. v. State (*CFE III*), 861 N.E.2d 50, 53 (N.Y. 2006) (evaluating state's new funding plan after prior finding of liability); DeRolph v. State, 677 N.E.2d 733, 737–40 (Ohio 1997) (detailing various flaws in state's funding scheme).

[98] *Abbeville Cty. Sch. Dist.*, 767 S.E.2d at 171 (rejecting finding that state had done enough to ensure access to quality teachers); *CFE II*, 801 N.E.2d 326, 340 (N.Y. 2003) (finding that state's funding policies were a causal factor in New York City's inability to hire quality teachers).

[99] Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va. 1979) (requiring "careful state and local supervision to prevent waste and to monitor pupil, teacher and administrative competency"); *Rose*, 790 S.W.2d at 193 ("An adequate school system must also include careful and comprehensive supervision at all levels to monitor personnel performance and minimize waste. If and where waste and mismanagement exist, including but not limited to improper nepotism, favoritism, and misallocation of school monies, they must be eliminated, through state intervention if necessary.").

[100] *See generally* Goss v. Lopez, 419 U.S. 565 (1975) (holding that due process requires that schools afford students notice and an opportunity to respond prior to suspension).

[101] *See infra* notes 249–311 and accompanying text.

obligate a state to intervene in and manage the discipline system in a way that furthers educational quality rather than undermines it.

Third, the disproportionate burden of school discipline on at-risk students should trigger the state's obligation to help at-risk students overcome academic barriers. At-risk students happen to be the ones most often disciplined in schools.[102] Thus, they suffer the most direct negative academic consequences of suspension and expulsion. The states' obligation to both avoid this outcome and assist students in achieving better outcomes should require the state to take specific action to alter existing discipline policy and practice. The recognition of this point would further offer an important counter to the traditional notion that consequences for student misbehavior rightly falls solely on the misbehaving student.

Finally, the foregoing principles also offer a strong rejoinder to the notion that the fault in discipline policy lies with misguided exercises of local discretion. Because schools exercise enormous discretion in making discipline decisions, states would instinctively respond that variances in the discipline decisions that occur across schools and districts—whether good or bad—are not of the state's making. Thus, the state cannot be held liable. School finance precedent, however, suggests that local districts are not so easily separated from the state because the state retains the responsibility to monitor and direct their activities toward appropriate educational outcomes. Each of these points is further explored in Parts II and III.

II. THE CONSTITUTIONAL RIGHT TO EDUCATION REQUIRES HEIGHTENED SCRUTINY OF DISCIPLINE POLICIES

In the late 1990s, a few individual students and their attorneys happened on the idea that school finance precedent might offer a basis to limit their exclusion from school. If school finance precedent rendered education a fundamental or constitutional right, some form of heightened scrutiny—either intermediate or strict scrutiny—should apply when states take that education away from students. These discipline cases, however, were uncoordinated and idiosyncratic. Relatively few cases have been filed and even fewer decided by a high court. Those few state courts that issued opinions in these cases afforded the key constitutional issues varying degrees of attention and reached conflicting results. For purposes of analysis, the decisions can be grouped into four categories, each of which is explored in Section II.A. None of these approaches have proven to be a good model for future litigation. The interplay between discipline policies

[102] LOSEN & MARTINEZ, *supra* note 5, at 8 tbl.1 (showing the high rates of suspension for racial minorities, students with disabilities, and English Language Learners).

and the constitutional right to education remains grossly undertheorized and past litigation strategies seriously flawed. Section II.B details those flaws. Section II.C then offers a new litigation strategy and framework for correcting those flaws.

A. Past Responses to Extending School Finance Precedent to Discipline

1. Students Forfeit Their Rights Through Misbehavior.—Two courts treat the development of the constitutional right to education in school finance precedent as practically irrelevant to discipline. The supreme courts of Massachusetts and Wyoming reasoned that the right to education is subject to a student's good behavior.[103] That is, misbehaving students forfeit the right to education.[104] Massachusetts's highest court wrote that the state constitution imposes on the state a "duty to provide children an adequate public education[, which] includes the duty to provide a safe and secure environment in which all children can learn."[105] But the court reasoned that "a student's interest in a public education can be forfeited by violating school rules," or in the instant case, by bringing what the school termed a weapon to school.[106] Thus, the heightened scrutiny that might otherwise have applied was never triggered.[107] Instead, the default rational basis review applied.[108] The Wyoming Supreme Court, in contrast, recognized that education was a fundamental right that could trigger strict scrutiny, but similar to Massachusetts emphasized that schools have the authority to prohibit certain behavior and a student can "temporarily forfeit educational services through his own conduct."[109] This fact, as much as any justification the school might offer for exclusion, weighed heavily on the court's analysis. "The actual receipt of educational services is accordingly contingent upon appropriate conduct in conformity with state law and school rules."[110] In sum, under these courts' approaches, the existence of a constitutional or fundamental right to equitable or adequate educational opportunities does almost nothing to increase the protections afforded to suspended and expelled students.

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[103] Doe v. Superintendent of Sch., 653 N.E.2d 1088, 1096 (Mass. 1995); *In re* RM, 102 P.3d 868, 874 (Wyo. 2004).

[104] *Doe*, 653 N.E.2d at 1096.

[105] *Id.*

[106] *Id.*

[107] *Id.* at 1097.

[108] *Id.* at 1096.

[109] *In re* RM, 102 P.3d 868, 874 (Wyo. 2004).

[110] *Id.*

2. School Exclusion Infringes a Fundamental Right and Triggers Strict Scrutiny.—While forfeiture theory may remain as a motivation to reach a particular doctrinal conclusion, other courts have focused more on whether school finance precedent creates a right that would trigger heightened scrutiny.[111] They are split on the answer to this question but share a similarly cursory approach to the analysis. Those courts that find a right generally assume or infer its existence without any serious analysis of precedent on the issues. For instance, in *Phillip Leon M. v. Greenbrier County Board of Education*,[112] the West Virginia Supreme Court held that strict scrutiny applies to school exclusion, reasoning that prior school finance precedent indicates education is a fundamental right.[113] While prior cases had treated education as a fundamental right, the context there was quite different. The issue in those prior school finance cases was about the "discriminatory classification found in the educational financing system," which raises class-based discrimination concerns and systemic statewide injuries.[114] The court in *Phillip Leon* was willing to import the precedent from school finance without accounting for these distinctions. A few years later, a New Jersey trial court recognized the importance of the state constitutional right to education and held that "expulsion of an adjudicated juvenile by his local school board does not sound the death knell for his constitutional right to receive alternative education in another setting."[115] The court did not specifically frame its analysis in terms of strict scrutiny, but clearly implied the state lacked a justification for entirely excluding students from education, even those having engaged in the most serious types of misconduct.[116] The most careful examination of the question may have been by the Wyoming Supreme Court, but as suggested above, its analysis, in effect, elevated the notion of forfeiture based on misbehavior above that of forcing the state to justify exclusion.[117]

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[111] *See, e.g.*, Phillip Leon M. v. Greenbrier Cty. Bd. of Educ., 484 S.E.2d 909, 913 (W. Va. 1996), *holding modified by* Cathe A. v. Doddridge Cty. Bd. of Educ., 490 S.E.2d 340 (W. Va. 1997) ("[W]hen a state acts to the disadvantage of some suspect class or to impinge upon a fundamental right explicitly or implicitly protected by the West Virginia Constitution, strict scrutiny will apply, and the state will have to prove that its action is necessary because of a compelling government interest.").

[112] 484 S.E.2d at 909.

[113] *Id.* at 910 (relying on the basic previous holding in *Pauley v. Kelly* that education is a fundamental right).

[114] Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979).

[115] State *ex rel.* G.S., 749 A.2d 902, 907 (N.J. Super. Ct. Ch. Div. 2000).

[116] *Id.* at 904, 908 (finding that a student who "participat[ed] in [a] bomb threat incident" in a district with a "history of several such incidents" still has a right to receive alternative education until he graduates or turns nineteen years old).

[117] *In re* RM, 102 P.3d 868, 874 (Wyo. 2004) ("[T]he fundamental right to an opportunity for an education does not guarantee that a student cannot temporarily forfeit educational services through his own conduct.").

3. School Exclusion Does Not Infringe Any Fundamental or Constitutional Right to Education.—Those courts that reject the existence of a constitutional right that triggers heightened scrutiny do so on equally simplistic reasoning. They conclude that past school finance cases never specifically and explicitly declared such a right—even though those courts never rejected such a right either. For instance, the Supreme Judicial Court of Massachusetts wrote that its prior school funding decision "should not be construed as holding that the Massachusetts Constitution guarantees each individual student the fundamental right to an education."[118] The rejection of a fundamental right in the discipline case was premised on the notion that the prior school funding case had held that the state had a duty to afford students an adequate education, not that education is a fundamental right.[119] While this distinction is technically accurate, it entirely ignores the fact that the school funding plaintiffs had premised the state's duty to deliver adequate education on the notion that students had a constitutional right to education. The Supreme Judicial Court in the funding case had written

> The defendants argue that the placement of the education provision in "The Frame of Government," rather than in the "Declaration of Rights," undermines the plaintiffs' argument that they have a constitutional "right" to education. . . . [T]his argument is unpersuasive; we believe that the placement of the education provisions in Part II, The Frame of Government, is a forceful statement that education is both a duty of and a prerequisite for republican government. And, if "legislatures and magistrates" have a constitutional duty to educate, then members of the Commonwealth have a correlative constitutional right to be educated.[120]

The Nebraska Supreme Court's treatment of the issues was even more cursory, dismissing the fundamental right to education as a limitation on discipline in one short paragraph. It wrote that while "we have construed the [education clause in the state constitution] as pertinent to the issue of the constitutionality of school financing," the court has "not construed this language in the context of student discipline to mean that a fundamental right to education exists in this state, and we decline to do so today."[121] It offered no explanation for rejecting the right other than that no prior court

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[118] Doe v. Superintendent of Sch., 653 N.E.2d 1088, 1095 (Mass. 1995).

[119] *Id.*

[120] McDuffy v. Sec'y of Exec. Office of Educ., 615 N.E.2d 516, 527 n.23 (Mass. 1993) (citing Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978)).

[121] Kolesnick v. Omaha Pub. Sch. Dist., 558 N.W.2d 807, 813 (Neb. 1997).

had established the right. In the absence of such a right, Nebraska and Massachusetts would only apply rational basis to school exclusions.[122]

4. School Exclusion Implicates Statutory Rights and Triggers Intermediate Scrutiny.—The final two states to address school discipline in light of a possible constitutional right to education fall squarely between the rational basis approach of Massachusetts and Nebraska and the strict scrutiny approach of West Virginia, New Jersey, and Wyoming. Mississippi applied a review closely resembling intermediate scrutiny without explicitly naming it as such, while North Carolina explicitly adopted intermediate scrutiny.

In Mississippi, no school finance precedent existed to establish education as a fundamental right, nor did the state constitution have an education clause suggesting as much.[123] But in *Clinton Municipal Separate School District v. Byrd*,[124] a long-term suspension case, the Mississippi Supreme Court indicated that "the right to a minimally adequate public education created and entailed by the laws of this state is one we can only label fundamental."[125] The court did not, however, apply strict scrutiny in evaluating the school's disciplinary policy.

Instead, the court indicated that the question was whether the punishment "furthers a substantial legitimate interest of the school district."[126] The standard articulation of intermediate scrutiny is that it requires an "important" government interest and means that "substantially" further the important interest, whereas rational basis requires a "legitimate" state interest and means that are "rationally related" or simply "further" the legitimate interest.[127] The standard offered in *Clinton* does not squarely fit in either, but insofar as it includes the idea of substantiality, it would appear to require a justification in excess of rational basis. Yet, the court's later emphasis on deferring to schools sounds in rational basis review:

> The authority vested in school boards consistent with this constitutional limitation includes substantial discretion with respect to the administration of punishments to students who violate school rules. This Court has heretofore

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[122] *Id.*; *Doe*, 653 N.E.2d at 1097.

[123] Thro, *supra* note 21, at 1661; *see also* Clinton Mun. Separate Sch. Dist. v. Byrd, 477 So. 2d 237, 240 (Miss. 1985) (noting that the obligation to provide education came from statutes).

[124] 477 So. 2d 237.

[125] *Id.* at 240.

[126] *Id.*

[127] *Id. See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 687 (4th ed. 2011) (describing the requirements for each standard of review).

> determined that it will not interfere with school boards in the exercise of such discretion so long as constitutional parameters are not transgressed.[128]

Moreover, the court justified its conclusion that the students' punishment met the standard by pointing to federal cases involving similar facts, but which had applied rational basis review in the context of substantive due process challenges.[129]

A decade later, another Mississippi student challenged a ten-day suspension and denial of alternative education, which combined to severely impact his grades and course credit in school.[130] The Mississippi Supreme Court restated its earlier constitutional holding in *Clinton*,[131] but refrained from deciding the case on constitutional grounds. It reasoned that a state statute requiring districts to provide alternative education offered a sufficient ground to rule in the student's favor.[132] The statute applied to all suspended and expelled students, regardless of the reasons for or length of suspension.[133] Thus, the district's denial of access to alternative school during the suspension was prohibited.[134]

The most recent decision addressing the intersection of discipline and the constitutional right to education was decided in North Carolina in *King ex rel. Harvey-Barrow v. Beaufort County Board of Education*.[135] Like Mississippi, the court decided the case on statutory rather than constitutional grounds, holding that students have a statutory right to alternative education.[136] Background concerns about the constitutional right to education heavily influenced the court's reasoning. The court wrote:

> [A] fundamental right to alternative education does not exist under the state constitution. Nevertheless, insofar as the General Assembly has provided a statutory right to alternative education, a suspended student excluded from alternative education has a state constitutional right to know the reason for her exclusion.[137]

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[128] *Clinton*, 477 So. 2d at 240–41 (citing Shows v. Freeman, 230 So. 2d 63, 64 (Miss. 1969)).

[129] *Id.* at 241.

[130] *In re* T.H., III, 681 So. 2d 110, 115–17 (Miss. 1996).

[131] *Id.* at 114 (citing *Clinton*, 477 So. 2d at 240) ("[W]e agree that T.H. has a fundamental right to an education as guaranteed by Article 3, Section 14 of the Mississippi Constitution.").

[132] *Id.* at 116 (discussing Mississippi statutes in effect at the time).

[133] *Id.* ("In the statute, the Legislature makes no exceptions for particular categories of offenses. Suspended or expelled students are eligible for the alternate programs where they exist.").

[134] *Id.* at 117.

[135] 704 S.E.2d 259, 261 (2010).

[136] *Id.*

[137] *Id.*

This constitutional right to know—rather than simply a statutory right to alternative education alone—triggered intermediate scrutiny of school exclusions.

This "constitutional right to know" sounds very similar to the procedural due process right to notice first articulated by the U.S. Supreme Court in *Goss v. Lopez*.[138] *Goss* required schools to apprise students of the evidence against them and the reason for suspension.[139] The court in *King*, however, was referencing a much different right. The point in *Goss* was to allow students to contest the accuracy of the evidence. The right in *King* is to know the reason for exclusion and question, regardless of the evidence, whether it is a normatively good reason. In other words, even if a student stole another student's cookies, stealing cookies may not be a compelling enough reason to expel a student.

This right to contest the sufficiency of the basis for exclusion was previously unheard of in state cases. The court in *King* only recognized such a unique right to avoid conflict with the state constitution's guarantee to every student of "an opportunity to receive a sound basic education in our public schools" and its prior holdings that equal access to and participation in education "is a fundamental right."[140] Whereas deprivation of the fundamental right to education itself may have triggered strict scrutiny, the court reasoned that the statutory right to alternative education combined with this new right to know only required intermediate scrutiny.[141]

B. Flaws and Limitations in the Litigation

While the foregoing cases differ in the scrutiny applied, they are similar in their assumptions, flaws, and apparent uncertainty as to how to best approach the issues. To varying degrees, they all avoided serious analysis of the fundamental constitutional questions at issue. Rather than evaluate the existence of a right to education and the state's justification for taking it away, they obfuscated the issues by focusing on forfeiture theory, considering alternative school as a viable option, or addressing the issues solely in the context of cases involving serious misconduct. In all fairness, whether state constitutional education clauses create individual rights is a

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[138] 419 U.S. 565 (1975).

[139] *Id.* at 581 (requiring that a student "be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story").

[140] *King*, 704 S.E.2d at 261–62.

[141] *Id.* at 263–65.

complex question,[142] and this complexity may help explain why no court clearly addresses it.[143] Nonetheless, the alternative grounds on which the courts decide the cases adds to their dissonance. The following Sections analyze each of these problems.

1. Bad Facts Make Bad Law: Choosing the Wrong Cases.—One explanation for why the legal analysis in prior discipline cases is underdeveloped is that the facts disincentivized courts from seriously entertaining plaintiffs' claims. In effect, the facts of some of the cases involved sufficiently serious misconduct that the students may have been unable to reverse their suspension or expulsion under any level of scrutiny. In each of the cases discussed in Section II.A., the students admitted to engaging in serious misbehavior that potentially posed a danger to others or themselves. The offenses included firearm possession, alcohol consumption, the sale of marijuana, engaging in a multi-person brawl, possession of a hidden blade in a lipstick case, and possession of a switchblade knife.[144]

In the context of serious misbehavior, a court may have relatively little incentive to parse through the analysis of school finance precedent and fundamental or constitutional rights recognition, much less declare a new right. Moreover, even if a court were to apply heightened scrutiny, serious misbehavior narrows the contested issues in problematic ways. Students who engage in weapon- or drug-related misbehavior, for instance, are not in a good position to challenge the state's authority to remove them from school. No one seriously challenges the state's authority to exclude students with drugs or weapons from regular school. Schools clearly have a substantial or compelling interest in safety.[145] Thus, even under strict scrutiny, the most a student could do is dispute whether a school's response to the misbehavior was narrowly tailored.[146] And the best remedy the student is likely to get is assignment to alternative school.

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[142] *See generally* Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949, 951–53 (2014) (arguing that school finance cases have not created "individual rights to education").

[143] *Id.* (arguing that "rights talk" in state constitutional cases is more "rhetoric" than "reality").

[144] *King*, 704 S.E.2d at 261 (fight involving multiple students); *In re* T.H., III, 681 So. 2d 110, 112 (Miss. 1996) (attended school activity having bought and consumed alcohol illegally); *In re* RM, 102 P.3d 868, 870 (Wyo. 2004) ("selling marijuana to other students while on school grounds"); Phillip Leon M. v. Greenbrier Cty. Bd. of Educ., 484 S.E.2d 909, 911 (W. Va. 1996) (firearm at school); Doe v. Superintendent of Sch., 653 N.E.2d 1088, 1090 (Mass. 1995) (blade in lipstick case); Kolesnick v. Omaha Pub. Sch. Dist., 558 N.W.2d 807, 810 (Neb. 1997) (switchblade knife).

[145] *See, e.g.*, *King*, 704 S.E.2d at 265; *In re RM*, 102 P.3d at 873 ("There is little doubt that the safety and welfare of students in the state are of utmost importance.").

[146] *See, e.g.*, *In re RM*, 102 P.3d at 874; *Phillip Leon*, 484 S.E.2d at 916.

These types of facts, nonetheless, have dominated past litigation—most likely because these students have the most at stake and litigation is their only option. In most of the above cases, students have been denied both the right to attend regular school and an alternative. Without judicial intervention, their public education is entirely over until the next school term or potentially longer. In contrast, a student who engages in less serious behavior, such as disrespecting a teacher, is more likely to receive a suspension ranging from one to ten days, which theoretically does not prevent the student from normal progress in school, but which still entail the high burdens of litigation to challenge. Yet, it is these very types of cases that need to be brought.

2. Better Facts Would Make Better Law.—To reform school discipline and protect the constitutional right to education, meaningful litigation must avoid weapon and drug cases and, instead, focus on everyday discipline and exclusion. Drug and weapon offenses only account for a very small portion of school exclusions.[147] In Indiana, for instance, they account for only about 5% of all suspensions and expulsions.[148] A full 51% of suspensions were for "disruptive behavior" and another 44% fell in the catchall of "other."[149] In other words, 95% of suspensions in Indiana involved relatively minor misbehavior.[150] It is here, in the predominant circumstances in which suspension and expulsion occur, where students' constitutional claims are strongest.

A school that regularly suspended disruptive, disrespectful, and defiant students (and potentially expelled repeat offenders) would face two substantial hurdles under heightened review. The school would lack an obvious substantial or compelling interest in excluding these students. School safety is a compelling interest,[151] but these students do not pose a serious physical threat to themselves or others, as would students who brought real weapons or drugs to school. Likewise, a school likely has a very important or compelling interest in maintaining an orderly learning environment,[152] but an orderly school environment is a far more contextual

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[147] *See, e.g.*, LOSEN & MARTINEZ, *supra* note 5, at 20; CONN. STATE DEP'T OF EDUC., *supra* note 5, at 50.

[148] Rausch & Skiba, *supra* note 5, at 2.

[149] *Id.*

[150] *Id.* at 6.

[151] *See, e.g.*, *In re RM*, 102 P.3d at 873 (agreeing with district's assertion that safety is a compelling interest and adding that "[t]here is little doubt that the safety and welfare of students in the state are of utmost importance").

[152] For instance, the U.S. Supreme Court has recognized a school's authority to infringe on students' free speech when it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

concept. A school in which teachers spend most of their time settling students down and attempting to keep them focused on learning would probably fall in the category of disorderly, but does the occasional student outburst or disruption seriously undermine order and learning or is it simply something to be expected from time to time? Either way, social science indicates that using suspensions and expulsions as a primary means of dealing with minor student misbehavior does not work.[153] To the contrary, it often makes matters worse. A school's gut instinct that removing disruptive students breeds order and respect might suffice under permissive rational basis review, but would require far more validation under heightened scrutiny.

The second hurdle in excluding students for routine misbehavior would be demonstrating that exclusion is narrowly tailored. A denial of both regular and alternative education is an overbroad response.[154] While some courts have found that total exclusion is a narrowly tailored response to serious misbehavior, the same does not follow for disrespectful students. They do not pose safety threats and, in alternative school, no longer pose a disruption to the regular school environment.[155] Schools that deny these students alternative education do so simply to avoid the financial cost, but avoiding costs alone would be insufficient to render exclusion narrowly tailored.[156]

But as emphasized above, access to quality alternative schools is a distraction. With minor misbehavior, any number of more moderate

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[153] *See infra* notes 249–76.

[154] Studies consistently show that suspension just makes matters worse for both the punished student and his peers. *See, e.g.*, AM. PSYCHOLOGICAL ASS'N ZERO TOLERANCE TASK FORCE, *Are Zero Tolerance Policies Effective in the Schools?: An Evidentiary Review and Recommendations*, 63 AM. PSYCHOL. 852 (2008) (surveying the literature detailing the negative effects of zero tolerance and suspensions); Linda M. Raffaele Mendez et al., *School Demographic Variables and Out-of-School Suspension Rates: A Quantitative and Qualitative Analysis of a Large, Ethnically Diverse School District*, 39 PSYCHOL. IN THE SCHS. 259 (2002). They also show that positive behavioral supports, rather than suspension, are effective. Catherine P. Bradshaw et al., *Examining the Effects of Schoolwide Positive Behavioral Interventions and Supports on Student Outcomes*, 12 J. OF POSITIVE BEHAV. INTERVENTIONS 133, 133 (2010); *see also* GREG ANRIG, THE CENTURY FOUND., LESSONS FROM SCHOOL IMPROVEMENT GRANTS THAT WORKED 17–18 (2015), http://www.tcf.org/bookstore/detail/lessons-from-school-improvement-grants-that-worked [https://perma.cc/SZ9U-UABR] (finding that when properly implemented, interventions other than referral to the office for discipline work the overwhelming majority of the time).

[155] The Supreme Court of New Jersey, in discussing model alternative schools, emphasized that they are "created for students who have difficulty with the more impersonal environment of the typical large high school. Many alternative schools cater to students who have a combination of learning, behavior, and family problems and need a supportive learning environment." Abbott v. Burke (*Abbott IV*), 710 A.2d 450, 532 (N.J. 1998).

[156] Phillip Leon M. v. Greenbrier Cty. Bd. of Educ., 484 S.E.2d 909, 915 (W. Va. 1996) (recognizing the challenge of funding alternative schools, but rejecting cost as a legitimate basis for denying students' access).

responses ranging from detention or lost privileges to thoughtful conversations with counselors or principals are just as—if not more—effective in protecting the students' right to education while also maintaining order.[157] These, of course, are just the low-cost ways of dealing with misbehavior. A large body of research shows that schools and students would be best served to institute positive behavioral supports or restorative justice programs.[158] These programs remediate misbehavior and often reduce it in the first instance, whereas punitive discipline tends to undermine behavioral and academic outcomes.[159]

In sum, the deference courts might afford schools regarding students who bring weapons or drugs to school does not exist with routine misbehaviors that lead to most school exclusions. Litigating serious misbehaviors, like the focus on alternative schools, has distracted from the key issues in school discipline and made student victories harder to secure. Litigation focused on nonserious misbehavior, in contrast, would place the state at a disadvantage, both in terms of articulating an important or compelling interest in punishment and in demonstrating that its chosen punishment is narrowly tailored.

3. Avoiding the Key Constitutional Issues.—Determining whether a student has a constitutionally protected interest in education involves complexities that none of the foregoing cases explored. Past cases have avoided addressing the question. Two courts avoided serious consideration of the issue by reasoning the students have forfeited any potential education right.[160] Two explicitly avoided the question by deciding the case on

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[157] Reece L. Peterson, *Ten Alternatives to Suspension*, 18 IMPACT, Spring 2005, at 10, https://ici.umn.edu/products/impact/182/over5.html [https://perma.cc/ET69-72XL]; JOEL ROSCH & ANNE-MARIE ISELIN, CTR. FOR CHILD & FAM. POL'Y DUKE UNIV., ALTERNATIVES TO SUSPENSION (2010), https://childandfamilypolicy.duke.edu/pdfs/familyimpact/2010/Alternatives_to_Suspension.pdf [https://perma.cc/P5XG-37PH].

[158] *See, e.g.*, ANRIG, *supra* note 154; Kelli Y. Beard & George Sugai, *First Step to Success: An Early Intervention for Elementary Children at Risk for Antisocial Behavior*, 29 BEHAV. DISORDERS 396 (2004); Bradshaw et al., *supra* note 154; Douglas A. Cheney et al., *A 2-Year Outcome Study of the Check, Connect, and Expect Intervention for Students at Risk for Severe Behavior Problems*, 17 J. EMOTIONAL & BEHAV. DISORDERS 226 (2009); Anne Gregory et al., *The Promise of Restorative Practices to Transform Teacher-Student Relationships and Achieve Equity in School Discipline*, 25 J. EDUC. & PSYCHOL. CONSULTATION 1–29 (2015).

[159] *See, e.g.*, Gregory, *supra* note 158; Beard & Sugai, *supra* note 158.

[160] Doe v. Superintendent of Sch., 653 N.E.2d 1088, 1096 (Mass. 1995); Kolesnick v. Omaha Pub. Sch. Dist., 558 N.W.2d 807, 813 (Neb. 1997).

statutory grounds.[161] And two assumed the question required no further analysis because school finance had resolved it.[162]

The North Carolina Supreme Court went the furthest in acknowledging the constitutional interests at stake, but still refused to directly rule on them. It acknowledged that a constitutional right to education would trigger strict scrutiny and rejecting the right would relegate problematic discipline policies to rational basis.[163] Believing both to be bad results, the court sought to strike a middle ground and apply intermediate scrutiny.[164] The problem is that it lacked any clear basis upon which to do so. Thus, it was compelled to articulate a previously unheard of "constitutional right to know" the reason for school exclusion.[165] This right, however, did not actually impose a limitation of exclusion itself, but rather offered the court a justification for applying heightened scrutiny to the loss of the statutory right in alternative education.[166] That the court would take such an awkward and unusual route toward its result reflects the significance of the underlying constitutional issues.

To North Carolina and the other courts' defense, no clearly defined roadmap to adjudicating individual personal constitutional education claims exists.[167] Even if school finance precedent clearly declared an individual right, the precedent offers no guidance as to how to apply that individual

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[161] King *ex rel.* Harvey-Barrow v. Beaufort Cty. Bd. of Educ., 704 S.E.2d 259, 261 (N.C. 2010); *In re* T.H., III, 681 So. 2d 110, 115 (Miss. 1996) (stating that statutory grounds "offer[] this Court an attractive alternative to avoid delving into school discipline cases on a constitutional level").

[162] Phillip Leon M. v. Greenbrier Cty. Bd. of Educ., 484 S.E.2d 909, 913–916 (W. Va. 1996); *In re* RM, 102 P.3d 868, 874 (Wyo. 2004).

[163] *King*, 704 S.E.2d at 262–64 ("The present case requires us to harmonize the rational basis test employed in school discipline cases with the strict scrutiny analysis that formed a part of this Court's constitutional holding in school funding cases.").

[164] *Id.* at 265 ("[I]ntermediate scrutiny strikes a practical balance between protecting student access to educational opportunities and empowering school officials to maintain safe and orderly schools.").

[165] *Id.* at 261 ("In acknowledging a statutory right to alternative education, we stress that a fundamental right to alternative education does not exist under the state constitution. Nevertheless, insofar as the General Assembly has provided a statutory right to alternative education, a suspended student excluded from alternative education has a state constitutional right to know the reason for her exclusion. This right arises from the equal access provisions of Article IX, Section 2(1) of the North Carolina Constitution.").

[166] *Id.* at 265 ("As applied to alternative education determinations, rational basis review undoubtedly upholds administrative decisions even in the absence of a proffered reason, as plaintiff experienced in the present case. But this Court's previous recognition of state constitutional rights to equal educational access and a sound basic education compels more exacting review. Accordingly, we hold that alternative education decisions for students who receive long-term suspensions are reviewed under the state constitutional standard of intermediate scrutiny." (citation omitted)).

[167] *See generally* Bauries, *supra* note 142, at 991–92 ("[T]he chief challenge in enforcing the education clauses of state constitutions is the 'inherently nebulous' nature of the quality-based terms in each clause. A common response to objections to the justiciability of education clauses based on the lack of judicially manageable standards is that courts interpret vague and subjective terminology in the Federal Constitution all the time.").

right in the context of discipline. Courts deciding discipline cases would face a number of open questions regarding the level of scrutiny to apply, the state interests and methods that would suffice under the chosen scrutiny, and how the right might also alter the due process necessary prior to exclusion.

Courts are disincentivized from addressing these difficult questions because a simpler, alternate roadmap is available. If a court decides on statutory or forfeiture grounds, a host of state and federal decisions dictate a straightforward analysis in which the only questions are whether the state has a rational basis for exclusion and whether the student received basic due process prior to exclusion.[168] Thus, when confronted with constitutional discipline claims in this precedential context, the easiest solution for reluctant or uncertain courts is to assume that school finance precedent has not changed anything and that the default procedural due process and rational basis analysis remains in place. In short, transitioning from the traditional context in which education is only a statutory right to one in which education is a constitutional right is fraught with difficulty given the novelty of the constitutional issues involved.

School finance precedent's failure to answer key questions regarding how the doctrines articulated there might apply in other contexts and the disincentives to answering these questions in discipline cases help explain the seemingly inapposite and confused results in discipline cases. All of the courts recognized the constitutional implications of school exclusion, but none could find definite and satisfying answers in school finance precedent.[169] As a result, they each found a way to skip the issue or minimize its relevance: Nebraska and Massachusetts by preempting the question based on forfeiture theory,[170] Wyoming and West Virginia by

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[168] *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 579 (1975) (requiring notice and opportunity to respond in all school exclusions); Newsome v. Batavia Local Sch. Dist., 842 F.2d 920, 923–24 (6th Cir. 1988) (applying the *Mathews v. Eldridge* balancing test to determine which exact processes are required in school discipline); Ratner v. Loudoun Cty. Pub. Sch., 16 F. App'x 140, 142 (4th Cir. 2001) (rejecting plaintiff's procedural due process claim and refusing to question the school's justification for exclusion because "federal courts are not properly called upon to judge the wisdom of a zero tolerance policy . . . or of its application to" a particular student). *See also* Larry Bartlett & James McCullagh, *Exclusion from the Educational Process in the Public Schools: What Process Is Now Due*, 1993 BYU EDUC. & L.J. 1 (1993) (providing an overview of what due process requires in school discipline).

[169] *See, e.g.*, Doe v. Superintendent of Sch., 653 N.E.2d 1088, 1095–97 (Mass. 1995); Clinton Mun. Separate Sch. Dist. v. Byrd, 477 So. 2d 237, 240–41 (Miss. 1985); Kolesnick v. Omaha Pub. Sch. Dist., 558 N.W.2d 807, 813 (Neb. 1997); *King*, 704 S.E.2d at 261–62; Phillip Leon M. v. Greenbrier Cty. Bd. of Educ., 484 S.E.2d 909, 913–15 (W. Va. 1996); *In re* RM, 102 P.3d 868, 872–74 (Wyo. 2004).

[170] *Doe*, 653 N.E.2d at 1096; *Kolesnick*, 558 N.W.2d at 813.

resting the weight of their analysis on narrow tailoring,[171] and Mississippi and North Carolina by awkwardly splitting the difference through statutory analysis.[172]

4. The Unresolved Tension Between Education Rights and Education Duties.—The question of whether school finance precedent creates individual rights is really a question of the nature and scope of those rights. While school finance cases often refer to constitutional rights or interests,[173] almost none of those cases involved the question of whether their state constitution's education clause created an individual personal right to education. Rather, the cases addressed the state's general systemic duty in education and the extent to which it obligates the state to create a quality or an equal system.[174] In other words, school finance cases clearly impose an education duty on the state, but whether those duties correspond to an individual personal right is rarely explicitly decided.[175]

The concept of a duty with no corresponding individual rights is troubling, but not unprecedented. Tort law, for instance, traditionally treats police and fire protection as public duties of local government, but those duties rarely create enforceable individual rights.[176] When local government voluntarily provides a finite service to the public at large, it does not presumptively obligate itself to meet the needs and interests of each individual citizen.[177] Were courts to recognize such a right, they would disincentivize government from taking on public duties in the first instance.[178]

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[171] *In re RM*, 102 P.3d at 876; *Phillip Leon*, 484 S.E.2d at 914–16, *holding modified by* Cathe A. v. Doddridge Cty. Bd. of Educ., 490 S.E.2d 340 (W. Va. 1997).

[172] *King*, 704 S.E.2d at 264–65; *In re* T.H., III, 681 So. 2d 110, 116–17 (Miss. 1996).

[173] *See* Bitner, *supra* note 20, at 779 (identifying sixteen states as recognizing education as a fundamental right, including Arizona, California, Connecticut, Kentucky, Minnesota, Mississippi, New Hampshire, New Jersey, North Carolina, North Dakota, Pennsylvania, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming).

[174] *See, e.g.*, Claremont Sch. Dist. v. Governor (*Claremont I*), 635 A.2d 1375, 1381 (N.H. 1993) (indicating the individual was enforcing a public duty); *see generally* Bauries, *supra* note 142, at 986–89 (finding that education has been enforced primarily as a duty); Sonja Ralston Elder, *Enforcing Public Educational Rights via a Private Right of Action*, 1 DUKE F. L. & SOC. CHANGE 137, 143–44 (2009) (revealing that the overwhelming percentage of cases have been brought on behalf of a group of students or a school district and sought to force the state to carry out its duty to a group of students rather than the rights or interests of individual students).

[175] Bauries, *supra* note 142, at 952–53 ("[B]oth the evidence presented and the remedies the courts order focus on the state education system as a whole, rather than on any individual student rights-holders.").

[176] DAN B. DOBBS, THE LAW OF TORTS 333, 723–24 (2000).

[177] *Id.* at 723.

[178] *Id.* at 726–37. *See, e.g.*, Riss v. City of New York, 240 N.E.2d 860, 860–61 (N.Y. 1968) (emphasizing that the amount of protection the City provides is to be dictated by the availability of local resources, not courts).

Education clauses, however, stand in stark contrast to these other public service duties. Today's legislatures and local districts are not voluntarily providing education or bestowing gratuitous benefits on individuals. Education is part of the constitutional compact between citizens and the government.[179] The point of that compact is to obligate the state to provide education regardless of the burden it imposes on the state.[180] Likewise, education clauses are not mere job descriptions or grants of power, like those granted to Congress and the President in the federal Constitution.[181] In many states, they are specific directives to achieve particular results for the benefit of citizens.[182]

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[179] In fact, this new education compact was for Southern states a condition of readmission to the Union following the Civil War. *See generally* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 90 (2009) ("A central feature of Radical Reconstruction was to require . . . the southern states to revise their constitutions . . . as a condition of *readmission* to the Union." (emphasis in original)); John C. Eastman, *When Did Education Become a Civil Right? An Assessment of State Constitutional Provisions for Education 1776–1900*, 42 AM. J. LEGAL HIST. 1, 26–27 (1998) (describing various developments in Confederate state constitutions following the Civil War). The legislatures that passed these new education amendments were heavily populated by former slaves who wanted to ensure access to education that would help guarantee their place as citizens. *See* James Lowell Underwood, *African American Founding Fathers*, *in* AT FREEDOM'S DOOR: AFRICAN AMERICAN FOUNDING FATHERS AND LAWYERS IN RECONSTRUCTION SOUTH CAROLINA 13–15 (James Lowell Underwood & W. Lewis Burke Jr. eds., 2000). State supreme courts, after reviewing the legislative history of their education clauses, often emphasize that the clause's purpose is to equip students for citizenship and ensure the continuance of democracy and self-government. *See, e.g.*, Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 227 (Conn. 2010) ("[T]he state constitution embodies a substantive component requiring that the public schools provide their students with an education suitable to give them the opportunity to be responsible citizens able to participate fully in democratic institutions, such as jury service and voting, and to prepare them to progress to institutions of higher education, or to attain productive employment and otherwise to contribute to the state's economy."); McDuffy v. Sec'y of Exec. Office of Educ., 615 N.E.2d 516, 548 (Mass. 1993) ("[T]his duty is designed not only to serve the interests of the children, but, more fundamentally, to prepare them to participate as free citizens of a free State to meet the needs and interests of a republican government, namely the Commonwealth of Massachusetts."); Brigham v. State, 692 A.2d 384, 397 (Vt. 1997) ("To keep a democracy competitive and thriving, students must be afforded equal access to all that our educational system has to offer. In the funding of what our Constitution places at the core of a successful democracy, the children of Vermont are entitled to a reasonably equal share.").

[180] In the South, of course, there was significant opposition to the provision of education, particularly to African-Americans. The new education clauses broke that resistance. Underwood, *supra* note 179, at 14–15; *see also* INST. FOR EDUC. EQUITY & OPPORTUNITY, EDUCATION IN THE 50 STATES: A DESKBOOK OF THE HISTORY OF STATE CONSTITUTIONS AND LAWS ABOUT EDUCATION (2008) (detailing the history of each education clause).

[181] U.S. CONST. art. 1, § 8 ("The Congress shall have Power To . . ."); *id.* art. 2, § 1 ("[The president shall] faithfully execute the Office [and] preserve, protect and defend the Constitution. . . .").

[182] *See, e.g.*, N.H. CONST. pt. 2, art. LXXXIII (stating that the purpose of education clause is "preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the [state] . . . [to] promot[e] . . . agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country"); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 395–96 (Tex. 1989) ("Other delegates recognized the importance of a diffusion of knowledge among the masses not only for the preservation of democracy, but for the prevention of crime and for the growth of the economy.").

Regardless, school discipline cases do not even acknowledge these underlying issues. Some simply assume a constitutional right to education exists while others conclude it does not exist for the purposes of school exclusion simply because school finance precedent does not explicitly declare such a right.[183] The latter assumption is incorrect. At worst, school finance precedent, on the whole, neither affirms nor rejects an individual constitutional right.[184] In other words, the question of whether students have an individual personal right to education may be an open question in precedent, but it is not foreclosed.

The discipline cases skip over the duty–rights distinction and the questions involved in finding an individual personal right in education by pointing to school finance opinions that speak of a "fundamental" right or interest in education or a "constitutional right" to an adequate education.[185] For the purpose of individual personal rights creation, however, these phrases are mere tautology. If the phrasing matters at all, it is only relevant to the type of scrutiny a court might presumptively apply.[186] But all of these courts apply some level of aggressive or heightened review and are functionally equivalent in the remedies they impose, all of which are aimed at the system of education, not individual rights. For that matter, a number of courts do not speak of rights at all, but only of states' constitutional duties in education. Yet, beyond that phraseology, the cases are practically indistinguishable.[187]

To be clear, these references to rights and constitutional duties are highly suggestive of an individual personal right to education. But they are not definitive because the issue of individual personal rights was never

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[183] *See, e.g.*, Doe v. Superintendent of Sch., 653 N.E.2d 1088, 1095 (Mass. 1995).

[184] *See* Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915, 937 (2016) (questioning the conclusion that a right to education does not exist simply because it has not been enforced by an injunctive remedy).

[185] *See, e.g.*, Bitner, *supra* note 20, at 778 (focusing on whether states had declared education a fundamental right).

[186] Fundamental rights presumptively trigger strict scrutiny. CHEMERINSKY, *supra* note 127, at 691. With the constitutional right to education, some courts apply strict scrutiny, while others apply some unnamed form of rigorous scrutiny. These latter courts appear to apply automatic liability as to the violation and deference as to remedy. *See, e.g.*, *CFE II*, 801 N.E.2d 326, 349 (N.Y. 2003) (holding the state strictly accountable for deprivation of sound basic education); Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 495 (Ark. 2002), *mandate recalled by* 142 S.W.3d 643 (Ark. 2004) ("[W]e conclude that the clear language of Article 14 imposes upon the State an absolute constitutional duty to educate our children . . . ."); *CFE III*, 861 N.E.2d 50, 52 (N.Y. 2006) (deferring on funding remedy). For purposes of rights creation, however, it does not matter whether the right is fundamental or constitutional or, for that matter, not labeled a right at all. What matters is whether a court enforced the education clause as though a right exists.

[187] *See generally* Weishart, *supra* note 184 (finding that, regardless of whether the underlying legal theory was based on a duty or a right, the evidence establishing liability and the remedies enforced in school finance litigation tend to be the same across cases).

squarely before the courts.[188] The central issue in school finance litigation, whether articulated in terms of duties or rights, was the enforceability of the state's obligation to establish and support an equal or quality education system.[189] Thus, pronouncements about rights in school finance cases occurred within a framework primarily focused on the state's duty to the public, not to individuals.

School finance courts come closest to meaningfully discussing individual rights when determining whether an individual can enforce the state's education duties against the state.[190] This issue, however, is more akin to a standing question than an individual rights question. In other words, because school finance cases do not turn on the existence of individual personal rights, almost no school finance precedent bothers to distinguish between state duties and individual personal rights. For that reason, the very few courts that afford the question of individual personal rights any significance offer only oblique insights.

The New Hampshire Supreme Court, for instance, specifically emphasized that "[t]he right to an adequate education mandated by the constitution is not based on the exclusive needs of a particular individual, but rather is a right held by the public to enforce the State's duty."[191] The court followed with the arguably contradictory statement that "[a]ny citizen has standing to enforce this right."[192] The Arkansas Supreme Court took a different tact, indicating that a state "constitution's specific charge to [the] legislature to provide education is sufficient to afford fundamental-right status to beneficiaries of that duty,"[193] but that it would refrain from deciding the issue to avoid triggering strict scrutiny.[194] Instead, it simply held that the constitution "imposes upon the State an absolute constitutional

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[188] Weishart persuasively argues that past school finance cases are best measured by their functional holdings rather than their precise rights terminology. *Id.* at 921. Under a functional approach, a much larger number of education clauses may create rights. *See id.* at 922. Under this reasoning, the discipline decision in *Doe v. Superintendent of School*, 653 N.E.2d 1088, 1095 (Mass. 1995), for instance, would have incorrectly inferred the absence of a right because the Supreme Judicial Court of Massachusetts had previously enforced a state duty to provide a sufficient education in *McDuffy v. Secretary of Executive Office of Education*, 615 N.E.2d 516, 554 (Mass. 1993).

[189] *See, e.g.*, Rose v. Council for Better Educ. Inc., 790 S.W.2d 186, 204 (Ky. 1989); Leandro v. State, 488 S.E.2d 249, 257 (N.C. 1997).

[190] Bauries, *supra* note 142, at 978–79 ("[T]he 'right to education' in these states seems to be nothing more than the standing of an individual to assert a generalized grievance concerning the systemic adequacy of the state education system.").

[191] *Claremont I*, 635 A.2d 1375, 1381 (N.H. 1993).

[192] *Id.* (citing Fogg v. Bd. of Educ., 82 A. 173 (N.H. 1912)).

[193] Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 493 (Ark. 2002), *mandate recalled by* 142 S.W.3d 643 (Ark. 2004) (citing *Claremont II*, 703 A.2d 1353 (N.H. 1997)).

[194] *Id.* at 495.

duty to educate our children."[195] In short, Arkansas and New Hampshire's individual rights analyses were indefinite because they were not central to the issues before the courts. On the issues actually before the courts, they were clear: their states have an education duty that is privately enforceable.[196]

The Washington Supreme Court offered the most direct discussion of whether there is an individual personal right that bears relevance beyond structural duties. In *Seattle School District No. 1 v. State*,[197] the court compared the right to education to the rights found in a bill of rights.[198] It would be "illogical [to conclude] that a mandatory constitutional provision placing an affirmative 'paramount duty' on the State to 'make ample provision for the education' of a specific class of citizens is not judicially enforceable," while the constitution's other affirmatively stated rights are judicially enforceable.[199] Thus, like other rights enumerated in the constitution, the court concluded that education is a "constitutional guarantee[] of a personal nature."[200] Yet, one could still query whether *Seattle School District* conclusively resolved the question of individual personal rights because, like other cases, it only involved the enforcement of the state's systemic education duty.[201] In this respect, the difference between the precise holdings in Washington and other states is minimal at best, notwithstanding the seemingly positive language in *Seattle School District* and the seemingly negative language in cases like New Hampshire's.[202]

In short, school finance precedent, on the whole, does not ascribe significance to the question of duties versus individual personal rights. In those few instances when a court seems to raise the issue, the resulting analysis does not directly answer the questions most pertinent to discipline. The fairest reading of school finance precedent may simply be that the scope of any individual right to education is not clearly defined, while state

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[195] *Id.*

[196] *Claremont I*, 635 A.2d at 1376 ("We hold that part II, article 83 imposes a duty on the State to provide a constitutionally adequate education to every educable child."); *Lake View*, 91 S.W.3d at 495 ("[W]e conclude that the clear language of Article 14 imposes upon the State an absolute constitutional duty to educate our children . . . .").

[197] 585 P.2d 71 (Wash. 1978).

[198] *Id.* at 86–87.

[199] *Id.* (citation omitted).

[200] *Id.* at 87.

[201] *Id.* at 84–87 (framing the issue as whether the education clause "is a mere preamble, or policy declaration, which imposes no judicially enforceable affirmative duty upon either the legislative or executive branches of government").

[202] *See generally* Weishart, *supra* note 184 (arguing that the education enforcement function is most important).

duties are. To the extent a court insists that an important distinction between duties and rights matter in discipline, the court must resolve the question itself, looking to precedent for guidance but not answers. In looking to those past courts for guidance, the most important thing is what those courts have done, not the tautology of what they have said.[203] What they have done is apply their state constitutional clauses in ways that force the state to provide improved educational opportunity for students.[204]

5. Students Do Not Forfeit Their Rights.—Two courts explicitly rejected students' discipline claims on the premise that the students had forfeited any right to education they might have.[205] Two others referenced forfeiture as a basis for lowering the scrutiny in discipline or sanctioning a temporary withdrawal of education services.[206] Another left open the possibility of forfeiture.[207] These statements and holdings are based on little more than intuition and rhetoric. Doctrine and logic do not support the conclusions.

As a general principle, individuals retain their constitutional rights, notwithstanding their conduct. Incarcerated criminals, for instance, retain their rights so long as they are not inconsistent with the conditions of their confinement.[208] The U.S. Supreme Court has gone so far as to hold that a criminal defendant does not give up the right to confront witnesses against

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[203] *Id.* at 961.

[204] *See generally* Rebell, *supra* note 21, at 1468, 1470 (cataloguing the judicial outcomes in favor of requiring the state to improve educational opportunities and resources for students); Weishart, *supra* note 184, at 936.

[205] Doe v. Superintendent of Sch., 653 N.E.2d 1088, 1096 (Mass. 1995); Kolesnick v. Omaha Pub. Sch. Dist., 558 N.W.2d 807, 814–15 (Neb. 1997).

[206] King *ex rel.* Harvey-Barrow v. Beaufort Cty. Bd. of Educ., 704 S.E.2d 259, 263 (N.C. 2010) (writing "*Leandro* does not immunize students from the consequences of their own misconduct" and a state may "temporarily remov[e] students who engage in misconduct that disrupts the sound basic education of their peers"); *In re* RM, 102 P.3d 868, 874–75 (Wyo. 2004) ("[T]he fundamental right to an opportunity for an education does not guarantee that a student cannot temporarily forfeit educational services through his own conduct. Educational services are provided with reasonable conditions because the Wyoming constitution requires that *all* students receive an equal opportunity to a quality education.").

[207] *Compare* Keith D. v. Ball, 350 S.E.2d 720, 722–23 (W. Va. 1986) ("The students in this case have temporarily forfeited their right to education."), *with* Phillip Leon M. v. Greenbrier Cty. Bd. of Educ., 484 S.E.2d 909, 914 (W. Va. 1996) (applying strict scrutiny, but indicating it was modifying *Keith* only to the extent *Keith*'s holding was inconsistent with the court's new opinion).

[208] *See, e.g.*, Hudson v. Palmer, 468 U.S. 517, 523 (1984) ("[P]risons are not beyond the reach of the Constitution. . . . Indeed, we have insisted that prisoners be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration."); Pell v. Procunier, 417 U.S. 817, 822 (1974) (stating prisoners "retain[] those First Amendment rights that are not inconsistent with" prison). Interestingly, states do strip many felons of the right to vote, which the Court thus far has sanctioned. *See* Richardson v. Ramirez, 418 U.S. 24, 56 (1974). The Fourteenth Amendment, however, includes a specific textual basis for this holding. *Id.* at 41–42.

him, even when he has acted violently toward those witnesses.[209] In addition, while the Constitution does not impose any general duty on the state to protect or provide for the welfare of citizens, during confinement, the state becomes obligated to feed, clothe, house, and protect prisoners from certain harms.[210]

The notion that criminals firmly retain their rights but misbehaving students do not is difficult to justify. Moreover, federal courts have specifically indicated that misbehaving students are in no way equivalent to criminals and retain their federal constitutional rights.[211] Thus, the idea in discipline cases that students forfeit state constitutional rights may have some rhetorical appeal, but the idea lacks any grounding in logic or law.[212] Some courts have therefore simply inappropriately resorted to this forfeiture theory as a means to avoid the key question of whether students have an individually enforceable right to education.

6. The Irrelevance of Alternative Schools.—Nearly all the discipline cases relying on school finance precedent thus far have been challenges to the failure to provide alternative education.[213] Litigating the constitutional right to education through alternative schools is fundamentally problematic for doctrinal and practical reasons. In terms of doctrine, litigating access to alternative school ignores the central question of importance: schools' authority to exclude students in general. Exclusion from school altogether unquestionably triggers procedural due process, which under the Supreme Court's seminal decision in *Goss v. Lopez* requires that students receive notice of the evidence against them and a chance to respond. Given that *Goss* was decided based on an underlying statutory right, additional procedural protections might be required when the underlying right at stake is a constitutional right to education. But the focus on alternative schools alters the issues. Litigants, in effect, concede that districts can remove

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[209] Giles v. California, 554 U.S. 353, 359 (2008) (no forfeiture so long as defendant's intent was not to deprive the court of access to witnesses).

[210] *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 104 (1976) ("[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain.'" (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976), *reh'g denied*, 429 U.S. 1066 (1977)).

[211] *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 338–39 (1985); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1968) (holding that public schools cannot be "enclaves of totalitarianism").

[212] *See* Bitner, *supra* note 20, at 794–95 ("School districts' conceptualization of student misbehavior as forfeiture is misleading, however. Due to the unique characteristics that children possess, students are not capable of intentionally relinquishing their rights under an implied consent or social contract theory.").

[213] *See* Amy P. Meek, *School Discipline "As Part of the Teaching Process": Alternative and Compensatory Education Required by the State's Interest in Keeping Children in School*, 28 YALE L. & POL'Y REV. 155, 180 (2009) (discussing the challenges seeking access to alternative education).

students from regular school and seek only to gain access to education through an alternative school. Likewise, when a court orders a district to provide alternative education, the court creates its own basis for avoiding the central constitutional issues.[214]

First, schools can argue that due process is not triggered when students have access to alternative school, asserting that expulsion is actually only a transfer.[215] Second, by framing the issue as access to alternative education, courts moot the constitutional question of the state's authority to deprive students of education. When courts require the state to provide education—albeit alternative education—they create the basis for the state to argue that students have not actually been deprived of the right to education. To show a deprivation of education, plaintiffs would need to show that the alternative school is qualitatively inferior to regular schools or that the alternative school falls below the constitutional threshold for an adequate or equal education.[216] This showing, if equivalent to that in school finance litigation, would place an impracticable burden of proof on individual students.[217]

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[214] *See, e.g.*, *In re* T.H., III, 681 So. 2d 110, 115–17 (Miss. 1996) ("[Alternative school] legislation offers this Court an attractive alternative to avoid delving into school discipline cases on a constitutional level."); King *ex rel.* Harvey-Barrow v. Beaufort Cty. Bd. of Educ., 704 S.E.2d 259, 261 (N.C. 2010) ("In acknowledging a statutory right to alternative education, we stress that a fundamental right to alternative education does not exist under the state constitution.") (applying intermediate scrutiny).

[215] *See, e.g.*, Nevares v. San Marcos Consol. Indep. Sch. Dist., 111 F.3d 25, 26 (5th Cir. 1997) (reasoning due process did not apply because student "was only to be transferred from one school program to another program with stricter discipline"); Buchanan v. City of Bolivar, 99 F.3d 1352, 1359 (6th Cir. 1996) (indicating due process is not triggered "absent some showing that the education received at the alternative school is significantly different from or inferior to that received at his regular public school" (first citing C.B. v. Driscoll, 82 F.3d 383, 389 n.5 (11th Cir. 1996); and then citing Doe v. Bagan, 41 F.3d 571, 576 (10th Cir. 1994))); Scott B. v. Bd. of Trs. of Orange Cty. High Sch. of the Arts, 158 Cal. Rptr. 3d 173 (Cal. Ct. App. 2013) (holding student removed from charter school not entitled to due process because he could seek enrollment in a regular school). To be clear, however, these courts' reasoning is flawed. The reputational injury of assignment to alternative school alone should be sufficient to trigger due process. *See* Goss v. Lopez, 419 U.S. 565, 576 (1975). *But see* Paul v. Davis, 424 U.S. 693, 712 (1976) (restricting reputation-based due process claims and reasoning that *Goss* was premised on the intersection of liberty and property). Moreover, even without a showing of inferiority, students' education property rights are sufficiently infringed to trigger constitutional protection. *See* Maureen Carroll, *Racialized Assumptions and Constitutional Harm: Claims of Injury Based on Public School Assignment*, 83 TEMP. L. REV. 903 (2011).

[216] This issue has come up most often with procedural due process, where courts have required some qualitative showing prior to entertaining a due process claim. *See, e.g.*, *Buchanan*, 99 F.3d at 1359; Doe v. Todd Cty. Sch. Dist., 2008 WL 5069367, at *5 (D.S.D. Nov. 24, 2008); Chyma v. Tama Cty. Sch. Bd., 2008 WL 4552942, at *3 (N.D. Iowa Oct. 8, 2008) ("It appears to be the consensus of the circuits, however, that placement in an alternative school does not implicate procedural due process rights unless there is a showing that the education provided by the alternative school is substantially inferior."). *But see* Carroll, *supra* note 215, at 913–14 (reasoning that this negative due process decision is not the consensus).

[217] *See, e.g.*, Leandro v. State, 488 S.E.2d 249, 261 (N.C. 1997) ("Only such a clear showing [that students have not received an adequate education] will justify a judicial intrusion into an area so clearly the province, initially at least, of the legislative and executive branches. . . .").

In addition to these doctrinal problems, focusing on access to alternative schools is also problematic as a practical matter. While high-quality alternative schools may be a viable option for some subset of at-risk students,[218] they are not general educational tools. First, they are not designed for the regular student who is otherwise succeeding in school but has been suspended or expelled for minor misbehavior.[219] These students lose the academic rigor of regular school and may gain nothing from the unique services of alternative school. Second, it is far from clear that alternative schools even work for the students who might actually need them. The most obvious problem is that many offer the lowest quality education imaginable; they are more akin to warehouses than locations of learning.[220]

Under such circumstances, litigants are fighting a battle that may not be worth fighting. What students really need is the right to remain in regular school. Focusing on the right to remain in regular school could force the state to offer a sufficient interest to exclude students. The cases, however, do not pose that challenge and are thereby reduced to fighting for a poor substitute to the constitutional right to education. Moreover, the existence of that substitute has become the basis by which to moot the key constitutional issues.

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[218] *Abbott IV*, 710 A.2d 450, 532 (N.J. 1998) (explaining how they can offer personalized education for at-risk students who need it).

[219] *Id.* (describing the model alternative school as one for students with "learning, behavior, and family problems and need [for] a supportive learning environment").

[220] Phillip Leon M. v. Greenbrier Cty. Bd. of Educ., 484 S.E.2d 909, 915 (W. Va. 1996) ("[T]he lack of resources is a major problem for some alternative education . . . ."); C.A. Lehr & C.M. Lange, *Alternative Schools and the Students They Serve: Perceptions of State Directors of Special Education*, 14 POL'Y RES. BRIEF, Jan. 2003, at 6 tbl.2, https://ici.umn.edu/products/prb/141/ [https://perma.cc/9V26-ECBU] (identifying insufficient "funds to provide for quality facilities and instructional resources," budget cuts, staffing certification, and accountability as issues in alternative schools); BRIAN KLEINER ET AL., NAT'L CENTER FOR EDUC. STATISTICS, PUBLIC ALTERNATIVE SCHOOLS AND PROGRAMS FOR STUDENTS AT RISK OF EDUCATION FAILURE: 2000-01, STATISTICAL ANALYSIS REPORT iv (2002) (finding that one-third of the districts had alternative schools that were at capacity and could not accept more students and finding that more than half had been in that situation in last three years); CHERYL M. LANGE & SANDRA J. SLETTEN, ALTERNATIVE EDUCATION: A BRIEF HISTORY AND RESEARCH SYNTHESIS 17–18 (2002) (summarizing several studies finding negative educational outcomes in alternative schools and indicating that the evidence on improved outcomes is mixed at best); ADVANCEMENT PROJECT ET AL., EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 36 (2005) (describing Chicago's alternative schools as warehouses for the students the district hopes will drop out); ADVANCEMENT PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE 14 (2000), http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies/crp-opportunities-suspended-zero-tolerance-2000.pdf [https://perma.cc/534A-84PP] (describing schools with a heavy police presence that lump grade levels together, run a shorter school day, and fail to provide instruction).

C. Framing an Individual Personal Right to Education that Limits School Exclusion

Courts and litigants must avoid the distractions of alternative school, notions of forfeiture, and extreme outliers in student behavior. They should focus on everyday minor misbehavior and whether schools can remove students for that minor misbehavior. The answer to that question rests first and foremost on whether students have an individual right to education grounded in the state constitution. If so, the state will struggle to justify harsh disciplinary approaches to these students because they do not pose serious risks to safety or the learning environment and other strategies other than exclusion are readily available for dealing with these students. If students do not have an individual state constitutional right to education, the state can largely discipline students as it sees fit (save those arguments articulated in Part III).

Whether students have a constitutionally-based right to education that limits school discipline could be framed in one of two ways. The first would ask whether students have a constitutional right or interest in education that school exclusion infringes. The other would ask whether any such education interest is a personal right or just the benefit that flows from the state carrying out its constitutional duties in education. The first framing is the simplest and easily points to recognizing a right to education.

All state constitutions include an affirmative duty to provide education.[221] If negative constitutional rights are enforceable as individual rights (i.e., to be free of unreasonable searches),[222] the conclusion that an affirmative constitutional duty does not create an individual right is tenuous. An individual right is the logical corollary of an enforceable constitutional duty,[223] even if a right is not explicitly stated. Consistent with that notion, most courts appear to assume or imply an individual right to education in school finance cases.[224] Others specifically use the language of

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[221] *See supra* note 21.

[222] *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 334 (1985).

[223] *See, e.g.*, McCleary v. State, 269 P.3d 227, 247–48 (Wash. 2012) ("Flowing from this constitutionally imposed 'duty' is its jural correlative, a correspondent 'right' permitting control of another's conduct. Therefore, all children residing within the borders of the State possess a 'right,' arising from the constitutionally imposed 'duty' of the State, to have the State make ample provision for their education." (citations omitted)).

[224] *See, e.g.*, Abbeville Cty. Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999) (never declaring a right, but holding that the "education clause requires the General Assembly to provide the opportunity for each child to receive a minimally adequate education"); *CFE II*, 801 N.E.2d 326, 349 (N.Y. 2003) (indicating the court's task of enforcing the constitution "began with *Levittown*'s articulation of the constitutional right to a sound basic education—not at all a 'catchphrase for an inferred constitutional guarantee,' but this Court's careful judgment 21 years ago as to what is meant by our State Constitution's promise in the Education Article").

fundamental rights, even if creating discipline rights was not their intent.[225] Sixteen states in total specifically declare education a fundamental right or interest in school finance cases.[226] Another large group of states reference a constitutional duty to deliver education, which again should logically dictate a right.[227] While these constitutional and judicial references and assumptions may not definitively create an individual constitutional right, they at the very least create a strong presumption that a right exists. To conclude a right does not exist, a state should be required to offer a specific and powerful rationale that, thus far, is entirely missing. After all, it is the state that is asking that it be exempted from providing education to certain students.

The second framing—personal right versus public duty—is arguably subterfuge to disengage from enforcing education clauses. As noted in Section II.B.2, a duty–rights distinction is a relatively unique concept. While it may make sense in some contexts, its fit is strained in education, particularly in the withdrawal of education. First, the affirmative education obligations in state constitutions and the refusal to carry out that duty in regard to some students is entirely distinct from the voluntary provision of other government services.[228] Second, while many school finance cases

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[225] *See, e.g.*, Serrano v. Priest, 487 P.2d 1241, 1244 (Cal. 1971); Horton v. Meskill, 376 A.2d 359, 374 (Conn. 1977); Rose v. Council for Better Educ. Inc., 790 S.W.2d 186, 206 (Ky. 1989); Robinson v. Cahill, 351 A.2d 713, 720 (N.J. 1975); Leandro v. State, 488 S.E.2d 249, 255–56 (N.C. 1997); Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247, 256 (N.D. 1994); Brigham v. State, 692 A.2d 384, 391–95 (Vt. 1997); Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979); Washakie Cty. Sch. Dist. No. One v. Herschler, 606 P.2d 310, 333 (Wyo. 1980).

[226] Bitner, *supra* note 20, at 766 (citing Shofstall v. Hollins, 515 P.2d 590, 592 (Ariz. 1973); *Serrano*, 487 P.2d at 1244; *Horton*, 376 A.2d at 374; *Rose*, 790 S.W.2d at 206; Skeen v. State, 505 N.W.2d 299, 313 (Minn. 1993); Clinton Mun. Separate Sch. Dist. v. Byrd, 477 So. 2d 237, 240 (Miss. 1985); *Claremont II*, 703 A.2d 1353, 1358–59 (N.H. 1997); *Robinson*, 351 A.2d at 720; *Leandro*, 488 S.E.2d at 255–56; *Bismarck Pub. Sch. Dist. No. 1*, 511 N.W.2d at 256; Sch. Dist. of Wilkinsburg v. Wilkinsburg Educ. Ass'n, 667 A.2d 5, 9 (Pa. 1995); Scott v. Commonwealth, 443 S.E.2d 138, 142 (Va. 1994); *Brigham*, 692 A.2d at 391–95; Cathe A. v. Doddridge Cty. Bd. of Educ., 490 S.E.2d 340, 346 (W. Va. 1997); Kukor v. Grover, 436 N.W.2d 568, 579 (Wis. 1989); *Washakie Cty. Sch. Dist. No. One*, 606 P.2d at 333.

[227] *See, e.g.*, McDuffy v. Sec'y of Exec. Office of Educ., 615 N.E.2d 516, 526 (Mass. 1993) (explaining the "duty to 'cherish' public schools as a duty to ensure that the public schools achieve their object and educate the people"); *Claremont I*, 635 A.2d 1375, 1378 (N.H. 1993) (writing that the "terms 'shall be the duty . . . to cherish' in our constitution . . . command[], in no uncertain terms, that the State provide an education to all its citizens and that it support all public schools"); *Abbeville Cty. Sch. Dist.*, 515 S.E.2d at 541 ("[T]he constitutional duty to ensure the provision of a minimally adequate education to each student in South Carolina rests on the legislative branch of government."). It is worth recognizing that scholars disagree as to whether such a duty creates rights. *Compare* Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705, 718–40 (2012) (questiong whether an education duty creates rights), *with* Weishart, *supra* note 184, at 920 (disagreeing with Bauries).

[228] *See generally* Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459 (2010) (analyzing positive and negative constitutional guarantees and how state courts should interpret and apply education clauses). *See also* Plyler v. Doe, 457 U.S. 202, 221 (1982) (noting that while education may not be a

have analyzed the state's "education duty" without referencing rights, the point has not been to contrast a duty to a right. Rather, the point has been to determine whether the state has an education duty at all and whether courts can qualitatively assess the manner in which the state discharges that duty.[229] Courts may have disagreed on their capacity to enforce or second-guess this duty, but no serious disagreement exists as to whether the state has a duty. The explicit language in education clauses clearly indicate they have a duty and, if they refused to discharge this duty completely, one could reasonably predict that even more courts would second-guess the state at that point.[230]

Third, the claim in discipline cases is not that the state is somehow doing a poor job of providing education to suspended and expelled students. Rather, the claim is that a state cannot take education away without a good reason and, even when it has a good reason, the state must be careful.[231] Plaintiffs are not asking courts to second-guess how the state carries out its duty. Instead, plaintiffs would be challenging the state's refusal to carry out its duty by excluding students under unnecessary circumstances.[232] The contrary notion that the state only has a duty to educate those students whom it wants to educate is a hard one to fathom.

In sum, precedent, logic, and constitutional clauses all point to the conclusion that students have an individual right to education. Where courts have glossed over a specific individual personal right in education, it may simply be because there is no reason to doubt that such a right exists. Those courts focusing on education duties have done so primarily as a strategy for removing themselves from the separation of powers struggles

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fundamental right under the federal Constitution, neither is it "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation").

[229] *See, e.g.*, Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 495 (Ark. 2002) ("[B]ecause we conclude that the clear language of Article 14 imposes upon the State an absolute constitutional duty to educate our children, we conclude that it is unnecessary to reach the issue of whether a fundamental right is also implied.").

[230] Even the U.S. Supreme Court in *San Antonio Independent School District v. Rodriguez* indicated that a different question would have been presented had plaintiffs demonstrated that the state was failing to provide the most minimal level of education. 411 U.S. 1, 36 (1973) (conceding that "some identifiable quantum of education is . . . constitutionally protected"). *See also* Papasan v. Allain, 478 U.S. 265, 285 (1986) ("[T]his Court has not yet definitively settled . . . whether a minimally adequate education is a fundamental right.").

[231] *See, e.g.*, King *ex. rel.* Harvey-Barrow v. Beaufort Cty. Bd. of Educ., 704 S.E.2d 259, 265 (N.C. 2010) ("We believe considerations of fairness, institutional transparency, and public trust are generally best effectuated when government provides a reason for its denial of services."); Phillip Leon M. v. Greenbrier Cty. Bd. of Educ., 484 S.E.2d 909, 914–16 (W. Va. 1996).

[232] *See, e.g.*, *Phillip Leon*, 484 S.E.2d at 912 (explaining that because the Board of Education "did not have a duty to provide an education to an expelled student . . . and . . . that by his acts, a pupil can forfeit all rights to a state provided education, the heart of our opinion centers on the right of a misbehaving pupil to an education in West Virginia").

involved in educational finances and quality,[233] not to negate an individual interest or right in education. Given the different context, a duty–right distinction need not necessarily arise in discipline. The difficult question in discipline should not be whether a constitutional right exists, but whether the state has a sufficient justification and narrowly tailored method for withdrawing that right from students who do not pose a serious threat to safety or order. As demonstrated in Section II.B.2, the state lacks any clear, important, or compelling interest in excluding students for minor misbehavior. Even if it does, far less intrusive means are available to achieve the state's interests, which narrowly tailoring would require.

D. Countering Likely Objections

The most likely objection to the foregoing individual rights claim would be that short-term suspensions, in and of themselves, do not amount to a deprivation substantial enough to trigger anything more than rational basis scrutiny. This objection might concede that an expulsion and denial of education services during expulsion might trigger strict scrutiny, but a short-term suspension only involves a temporary exclusion from school that can amount to less than one percent of the school year. As such, a suspension does not per se prevent a student from making regular academic progress and receiving quality educational opportunities. An analogous argument led the U.S. Supreme Court to require only minimal due process for short-term suspensions and a more formal process for expulsions and suspensions longer than ten days.[234] If accurate, this argument would negate almost the entirety of the analysis in Part II, as expulsions comprise a very small percentage of school exclusions.[235]

This argument overlooks two major points. First, the harm of a short-term suspension extends well beyond the time that a student misses from school. A single suspension significantly depresses academic achievement for the remainder of the year and in subsequent years.[236] Moreover, after a student is suspended once, his or her chances of subsequent suspension and

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[233] *See generally* MICHAEL A. REBELL, COURTS AND KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS 22–29 (2009) (discussing separation of powers holdings). *See, e.g.*, Coal. for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 408 (Fla. 1996); McDaniel v. Thomas, 285 S.E.2d 156, 167–68 (Ga. 1981).

[234] Goss v. Lopez, 419 U.S. 565, 581 (1975).

[235] *See, e.g.*, EDWARD J. SMITH & SHAUN R. HARPER, DISPROPORTIONATE IMPACT OF K-12 SCHOOL SUSPENSION AND EXPULSION ON BLACK STUDENTS IN SOUTHERN STATES 5 (2012) (finding that in Southern states "427,768 Black boys were suspended and 14,643 were expelled").

[236] *See, e.g.*, Edward W. Morris & Brea L. Perry, *The Punishment Gap: School Suspension and Racial Disparities in Achievement*, 63 SOC. PROBLEMS 68, 80–81 (2016); *see also* Section III.B.2.

expulsion rise dramatically.[237] In other words, all school exclusions, regardless of their length, are very serious occurrences in the academic life of a student. They cannot be minimized or distinguished simply by measuring them in terms of the amount of time a student misses from school.

Second, the standard showing for triggering constitutional scrutiny is whether a plaintiff has suffered a substantial harm.[238] If so, the requisite scrutiny applies. The scrutiny does not slide based on the extent of the harm. Thus, the question with suspensions would be whether they substantially impair the right to education, not whether they are as serious as an expulsion. The answer to the former is yes. Not only does a single suspension decrease achievement and increase the chance of subsequent suspension, studies show that the decrease is substantial—equivalent to decreases that courts have found sufficient to state a claim in adequacy and equity cases.[239]

The other objection one might raise to the foregoing arguments is that schools jeopardize the learning of others and cannot maintain orderly learning environments if they allow disruptive students to remain in the classroom. Thus, schools have a compelling interest for suspending students and doing so is necessary to achieve that interest. Social science does not, however, support this seemingly common-sense objection either. Part III explores the literature on this point in detail. For now, it suffices to say that studies show that suspension is an ineffective tool for maintaining order in schools. First, suspensions do not improve the behavior of students once they return to school.[240] Second, the decision to routinely suspend

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[237] TONY FABELO ET AL., BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT 37–38 (2011), http://issuu.com/csgjustice/docs/breaking_schools_rules_report_final-1/1?e=2448066/1603396 [https://perma.cc/PQF6-KE6V]; Linda M. Raffaele Mendez, *Predictors of Suspension and Negative School Outcomes: A Longitudinal Investigation*, 99 NEW DIRECTIONS FOR YOUTH DEV. 7, 25, 29–30 (2003); Tary Tobin et al., *Patterns in Middle School Discipline Records*, 4 J. EMOTIONAL & BEHAV. DISORDERS 82, 91 (1996).

[238] *See generally* CHEMERINSKY, *supra* note 127, at 816–17 (outlining a prima facie fundamental rights claim).

[239] *Compare* ANDY WHISMAN & PATRICIA CAHAPE HAMMER, W. VA. DEP'T OF EDUC., THE ASSOCIATION BETWEEN SCHOOL DISCIPLINE AND ACADEMIC PERFORMANCE: A CASE FOR POSITIVE DISCIPLINE APPROACHES, at v (2014) (explaining that suspended students are 2.4 times more likely to score below proficient), *and* Morris & Perry, *supra* note 236, at 80–81 (finding students suspended once actually regressed academically over the course of two years), *with* Hoke Cty. Bd. of Educ. v. State, 599 S.E.2d. 365, 382 (N.C. 2004) (examining student proficiency on tests to assess whether they had been deprived of an adequate education). *See also infra* Section III.B.3.

[240] Instead, suspension reinforces misbehavior and also simply makes it more likely that schools would impose suspension again for misbehavior. *See, e.g.*, Mendez, *supra* note 237, at 29–30. Thus, the policy of suspending students for minor misbehavior is really just the first step in adopting discipline policies that will escalate, increasing punishment until students are funneled into the juvenile justice

students for minor misbehavior alters the overall learning climate[241] and, thereby, depresses the academic achievement of well-behaved students,[242] whose education schools are purportedly acting to protect. In sum, while schools might assert an interest in maintaining school order, suspensions do not actually serve that interest. Moreover, asserting as much falsely pits misbehaving students against other students. Part III seeks to reframe the debate over school discipline and demonstrate that all students' interests are aligned with discipline policies that rely far less heavily on suspensions and expulsions.

III. EQUAL AND ADEQUATE EDUCATION OPPORTUNITIES AS A FUNCTION OF SCHOOL DISCIPLINE

While courts should recognize students' constitutional right to education and limit attempts by the state to withdraw that education, far more is at stake for the education system as a whole. Ineffective discipline harms everyone in school—from the misbehaving student to his peers to a school's overall academic quality. These later problems, however, call for a different analysis than Part II. The effects of a school environment and disciplinary policies on the overall school and its academic outcomes raise systemic questions. These questions go to the same core disputes that have dominated school finance litigation for the past half-century. These disputes do not center on whether students have individual rights, but whether the state is carrying out its constitutional duty to provide equal and adequate education opportunities.

As detailed in Section I.B, school finance precedent is built on several key principles. Both individually and collectively, these principles bring to the fore new and developing social science on the connection between discipline practices, school quality, and academic achievement. The state has the ultimate and final constitutional duty to ensure equal and adequate education opportunities. That duty extends beyond just money to nearly any educational policy or practice that deprives students of the educational opportunity their state constitution mandates. It also includes monitoring and supporting local districts to ensure students receive these opportunities. A number of demographic groups are particularly at risk of academic

system. *See generally* BROWNE, *supra* note 12 (identifying and critiquing a discipline system that amounts to a schoolhouse-to-jailhouse track).

[241] *See, e.g.*, RICHARD ARUM, JUDGING SCHOOL DISCIPLINE: THE CRISIS OF MORAL AUTHORITY 34 (2003) (students perceive discipline as random and unfair when it is too strict); Perry & Morris, *supra* note 11, at 1083.

[242] Perry & Morris, *supra* note 11, at 1068.

failure and the state must devote particular attention and resources to ensure these students can overcome academic barriers.[243]

New and developing social science lies at the core of these principles. Social science increasingly demonstrates that while student misbehavior is a function of individual choices that students make, individual student misbehavior is also a function of the school environment in which they learn and act.[244] Quality schools and orderly environments consistently produce higher student achievement and less misbehavior.[245] Low-quality schools with disorderly, hostile, and punitive environments produce lower student achievement and higher rates of suspension and expulsion.[246] Finally, because minority students disproportionately attend schools with problematic discipline policies, their academic outcomes are particularly depressed, which has the effect of widening achievement gaps.[247] Thus, reforming these discipline policies is one of the keys to delivering the equal and adequate education that school finance precedent mandates. The following Sections lay out this social science in detail and, for the first time, situate it within school finance precedent.

A. Social Science Connections Between Discipline and Student Achievement

1. School Exclusion Depresses Academic Achievement.—Some of the connections between discipline and student achievement are relatively obvious. For instance, studies consistently show that the amount of time spent in school and the quality of instruction and learning during that time directly affect achievement.[248] If students are in environments that interfere with their ability to focus on schoolwork, their academic achievement suffers.[249] If they are not in any school environment at all because they have

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[243] *See, e.g.*, *Hoke Cty. Bd. of Educ.*, 599 S.E.2d at 388–89 (agreeing with the trial court "that neither the State nor . . . [the Hoke County School System] are strategically allocating the available resources to see that at-risk children have the equal opportunity to obtain a sound basic education.").

[244] *Infra* notes 276–85.

[245] *Infra* notes 248–75.

[246] *Infra* notes 248–75.

[247] *Infra* notes 286–310.

[248] *See generally* Jere Brophy, *Research Linking Teacher Behavior to Student Achievement: Potential Implications for Instruction of Chapter 1 Students*, 23 EDUC. PSYCHOL. 235 (1988) ("[T]he key to achievement gain by low-achieving students is maximizing the time that they spend being actively instructed or supervised by their teachers."); Arthur J. Reynolds & Herbert J. Walberg, *A Structural Model of Science Achievement*, 83 J. EDUC. PSYCHOL. 97 (Mar. 1991) ("[I]nstructional time also proved instrumental in the achievement process by mediating the effects of other factors.").

[249] INA V.S. MULLIS ET AL., TRENDS IN INT'L MATHEMATICS AND SCI. STUDIES, TIMSS 2011 INTERNATIONAL RESULTS IN MATHEMATICS 263–64 (2012) (finding lower achievement in disorderly schools in an analysis of international math scores); Valerie E. Lee & Anthony S. Bryk, *A Multilevel*

been suspended or expelled, their academic achievement suffers.[250] If students' teachers are regularly pulled away from instruction to deal with discipline of one student, the academic achievement of other students suffers.[251] Studies find that, even after accounting for demographic variables, standardized test scores closely track suspension rates. Thus, to no surprise, schools with the most suspensions have the lowest test scores.[252]

Current research goes far beyond the simplistic notion that if misbehaving students are disrupting their classmates, their classmates learn less. If that were all the data revealed, schools might reasonably exclude the misbehaving student in the interest of preserving the educational environment for others. Nuanced studies indicate that a school's approach to discipline and frequency of suspensions heavily influence student achievement.[253] Even after controlling for race, poverty, and school type, suspension rates predict more than one-third of a school's overall academic achievement.[254] With all other things being equal, academic achievement is lower in schools with higher suspension rates.[255] As one study put it, "serving a high percentage of poor minority children does not mean that a

Model of the Social Distribution of High School Achievement, 62 SOC. OF EDUC. 172, 189 (1989) ("At a purely behavioral level, a minimum of disciplinary problems is a necessary condition for the routine pursuit of academic work.").

[250] *See, e.g.*, James Earl Davis & Will J. Jordan, *The Effects of School Context, Structure, and Experiences on African American Males in Middle and High School*, 63 J. NEGRO EDUC. 570, 581–83 (1994); *see also* Terrance M. Scott & Susan B. Barrett, *Using Staff and Student Time Engaged in Disciplinary Procedures to Evaluate the Impact of School-Wide PBS*, 6 J. POSITIVE BEHAV. INTERVENTIONS 21, 24 (2004) (detailing the time schools spend on disciplinary matters that could otherwise be spent on instruction and learning).

[251] *See generally* Scott & Barrett, *supra* note 250, at 23 (discussing the amount of time teachers spend on disciplining students rather than instruction).

[252] RUSSELL J. SKIBA ET AL., CONSISTENT REMOVAL: CONTRIBUTIONS OF SCHOOL DISCIPLINE TO THE SCHOOL-PRISON PIPELINE 29 (2003) ("[I]ncreased rates of school exclusion are correlated with lower achievement test scores."); RAUSCH & SKIBA, *supra* note 8, at 9, 18–19 (reviewing studies that find, for instance, "that a school's emphasis on discipline and the number of suspensions a student received negatively predicted achievement in mathematics, science, and history even when controlling for a number of other variables including socio-economic status").

[253] ADVANCEMENT PROJECT ET AL., ZERO TOLERANCE, *supra* note 220, at 12; Pamela Fenning & Jennifer Rose, *Overrepresentation of African American Students in Exclusionary Discipline: The Role of School Policy*, 42 URBAN EDUC. 536, 548 (2007) (finding that suspension and expulsion are related to school policies and factors not characteristics internal to students); Shi-Chang Wu et al., *Student Suspension: A Critical Reappraisal*, 14 URBAN REV. 245, 271–72 (1982); *see also* Gathogo Mukuria, *Disciplinary Challenges: How Do Principals Address This Dilemma?*, 37 URBAN EDUC. 432, 449 (2002) ("[P]rincipals in schools with low suspension rates care and have concern for the students. These findings are consistent with the work of Lomotey (1991), who found that effective African American principals have sympathy and concern for their students.").

[254] RAUSCH & SKIBA, *supra* note 8, at 16 (describing a suspension model that "includes socio-demographic variables [and] accounted for a moderately high amount of the total school variation in achievement scores (Adjusted r^2 = 53.2%), explaining an additional 36.1% of the total variation").

[255] *Id.*

school will necessarily have a high suspension rate,"[256] but having a high suspension rate does seem to mean that academic achievement, as measured by test scores, will decline.[257]

These findings would appear to fly in the face of conventional wisdom that believes excluding misbehaving students ensures orderly learning environments for everyone else.[258] The explanation lies in the fact that while schools must address and prevent misbehavior, how schools respond matters immensely. First, schools' response to student misbehavior—not just the misbehavior itself—affects the learning environment.[259] Suspending students on a regular basis negatively affects the general student body's perception of school authority and the school's climate.[260]

Second, as discipline becomes overly strict or harsh, the general student body—including well-behaved students—begins to perceive school authorities as arbitrary and unfair.[261] At that point, students may have any number of negative reactions, including resentment, opposition, fear, or disillusionment.[262] Some students who previously had no behavioral problems begin to act out, and misbehavior among "bad" students becomes all the more frequent.[263] Schools that persist in the idea that the problems with the school climate stem solely from misbehaving students, rather than the school's discipline policies, can spiral into complete dysfunction.[264] In

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[256] Mendez et al., *supra* note 154, at 273 (emphasis removed).

[257] *Id.* at 261.

[258] *See, e.g.*, Perry & Morris, *supra* note 11, at 1083 ("[T]he most common rationale for maintaining 'tough' exclusionary discipline policies . . . [is] that removing disruptive students creates a safe, orderly environment conducive to learning for students who conform to school rules.").

[259] *See generally* ARUM, *supra* note 241; Fenning & Rose, *supra* note 253, at 538–39 (emphasizing schools' ability to implement alternative discipline regimes that alter and improve school climate).

[260] *See, e.g.*, ARUM, *supra* note 241 (noting that the harshness of discipline negatively affects how the overall student body perceives school climate and authority); *see also* Davis & Jordan, *supra* note 250, at 26 (discussing the possible linkage between school climate and student achievement).

[261] ARUM, *supra* note 241, at 156.

[262] *Id.* at 182 (stating that students who perceived school discipline as unfair "had a 35 percent likelihood of expressing a willingness to disobey rules" compared to 5% when discipline was perceived as fair).

[263] *See generally* ARUM, *supra* note 241, at 155–57, 181–82 (discussing an overall increase in students' perception of disciplinary unfairness as discipline becomes more strict, as well as increased willingness to disregard school rules); Mendez, *supra* note 237 (finding suspension is a predictor of later misbehavior).

[264] Out of control dysfunction helps explain why some schools in Washington, D.C. and New Orleans have suspension rates as high as 50% and 75%, meaning that in a school with 400 students, the schools will impose 200 to 300 suspensions in a single year. *See* EVERY STUDENT EVERY DAY COAL., *supra* note 4, at 4 tbl.2 (indicating that the three highest suspending middle schools in the District of Columbia public school system have suspension rates of 67% to 72%); Kari Harden, *Civil Rights Complaints Are Filed Against Three N.O. Schools*, LOUISIANA WEEKLY (Apr. 22, 2014), http://www.louisianaweekly.com/civil-rights-complaints-are-filed-against-three-n-o-schools/ [https://perma.cc/EG5L-KMQH] (discussing a civil rights complaint against a charter school with a

short, schools cannot simply suspend their way out of discipline problems.[265]

Third, negative climates seemingly combine with escalating student misbehavior to drive down the academic achievement of "innocent bystanders."[266] New studies focus on how innocent bystanders suffer the "collateral consequences" of harsh discipline policies.[267] Tracking student suspensions and math achievement across years, researchers find that high levels of exclusionary discipline negatively affect the academic achievement of nonsuspended students.[268] The effect is strongest in schools with low levels of violence and high levels of exclusionary discipline.[269]

Finally, environmental climates and student achievement also have reciprocal effects on students' access to the most vital educational resource: quality teachers.[270] Teachers in negative environments are more likely to be absent from school, transfer schools, or quit teaching altogether.[271] The result is a further lowering of instructional and teacher quality in these schools.[272] The lowering of the quality of teaching further depresses a

68% suspension rate). These schools do not have the worst students in the nation; they have the worst school climates.

[265] *See generally* Blumenson & Nilsen, *supra* note 20, at 81. If zero tolerance policies eliminated troublemakers, "the initial jump in zero tolerance removals would fall off as troublemakers were expelled. Instead, schools are expelling and suspending ever larger numbers of students." *Id.*

[266] *See* Perry & Morris, *supra* note 11, at 1067 (finding that the academic achievement of students who are not suspended goes down when suspension rates are high).

[267] These consequences are analogous to those that flow from the mass incarceration in certain adult communities. *Id*.

[268] *Id.* at 1077 (explaining that in schools with above average suspension rates "we see an adverse effect of school suspension [on non-suspended students] that becomes especially pronounced at greater-than-one standard deviation above the mean (i.e., the top one-third of schools) . . . [while] [i]n schools with low levels of violence (one standard deviation below the mean), the negative effect of out-of-school suspension is very strong at high levels of suspension").

[269] *Id*.

[270] Dan Goldhaber & Emily Anthony, *Teacher Quality and Student Achievement*, 115 ERIC CLEARINGHOUSE ON URBAN EDUC. 1 (2003) (sharing research that shows "teacher quality is the most important educational input predicting student achievement"); Megan Hopkins, *A Vision for the Future: Collective Effort for Systemic Change*, 89 PHI DELTA KAPPAN 737, 737 (2008) (finding that quality of the teacher is the most important factor in student development, especially for low-income students of color).

[271] *See* Geoffrey D. Borman & N. Maritza Dowling, *Teacher Attrition and Retention: A Meta-Analytic and Narrative Review of the Research*, 78 REV. OF EDUC. RESEARCH 367, 397 (2008) (finding school environment and conditions to be a significant explanation of teacher turnover). This matters because teacher attendance and retention directly affect student performance. Davis & Jordan, *supra* note 250, at 581 ("[T]eacher absences had the strongest association with Black male achievement.").

[272] *See, e.g.*, LINDA DARLING-HAMMOND, THE FLAT WORLD AND EDUCATION: HOW AMERICA'S COMMITMENT TO EQUITY WILL DETERMINE OUR FUTURE 93, 118, 208, 314 (2010) (discussing the disincentive to teach students who are challenging to teach, how achievement variations across districts correlate with access to quality teachers, how teacher perceptions of students interfere with constructive interactions, and the connection between attrition and teacher quality).

school's academic achievement,[273] which makes it more difficult to attract quality teachers.[274] In short, once climate, discipline, achievement, and teacher quality begin to interact negatively, a vicious cycle can form, from which it is hard to escape.[275]

2. Schools' Approach to Discipline Matters.—The primary lessons of the foregoing research are that schools have a choice in how they approach discipline and that choice matters for student behavior and student achievement. While some level of student misbehavior is a given, how educators respond is a choice.[276] Schools are not passive participants in suspensions and expulsions, simply reacting to the unfortunate environment and circumstances they face.[277] Rather, schools themselves are also responsible for student misbehavior and the number of suspensions they impose.[278] As one researcher concluded after analyzing the data, students "interested in reducing their chances of being suspended . . . [would] be better off by transferring to a school with a lower suspension rate rather than by improving their attitudes or reducing their misbehavior."[279]

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[273] *See, e.g.*, Davis & Jordan, *supra* note 250, at 584–85 (finding that students achieved the lowest in classrooms where teachers assigned the least work and had the lowest expectations and these factors interacted with the overall disciplinary environment); Xin Ma & J. Douglas Willms, *School Disciplinary Climate: Characteristics and Effects on Eighth Grade Achievement*, 50 ALBERTA J. EDUC. RES. 169, 180–82 (2004) (finding that students' perceptions of their school's disciplinary climate were significantly correlated to student achievement across subjects).

[274] As one study demonstrated, teachers prefer to work in predominantly white and middle-income schools. Eric A. Hanushek et al., *Why Public Schools Lose Teachers*, 39 J. HUMAN RESOURCES 326, 337 (2004). But the effect of this preference can be to further depress needy students' access to quality teachers, which reinforces the achievement gap. *See generally* HEATHER G. PESKE & KATI HAYCOCK, EDUC. TRUST, TEACHING INEQUALITY: HOW POOR AND MINORITY STUDENTS ARE SHORTCHANGED ON TEACHER QUALITY 11 (2006), http://files.eric.ed.gov/fulltext/ED494820.pdf [https://perma.cc/B8XN-86AB] (examining unequal access to quality teachers and its effect on educational opportunity).

[275] Findings and Order Granting Final Approval of Settlement, Reed v. State, No. BC432420, at 28–29, 2011 WL 10893745, at *16 (Cal. Super. Ct. 2011) ("[S]chools with high teacher turnover can fall into a 'vicious cycle' in which the high turnover itself makes it more difficult to recruit and retain teachers, contributing to continued high turnover.").

[276] RAUSCH & SKIBA, *supra* note 8, at 22.

[277] *Id.* (explaining that while "some portion of a school's suspensions and expulsions are due to student misbehavior and anti-social attitudes," the remainder is a product of "a complex and multi-determined [administrative] process").

[278] *See, e.g.*, ANNE WHEELOCK, MASS. ADVOCACY CTR., THE WAY OUT: STUDENT EXCLUSION PRACTICES IN BOSTON MIDDLE SCHOOLS (1986); Mukuria, *supra* note 253, at 449 (finding that principal attitudes rather than student behavior played a significant factor in suspension rates); Dona M. Kagan, *How Schools Alienate Students at Risk: A Model for Examining Proximal Classroom Variables*, 25 EDUC. PSYCHOL. 105, 107 (1990) (noting a study that found different discipline outcomes when students transferred to a new school); SKIBA ET AL., CONSISTENT REMOVAL, *supra* note 252, at 31–32 (finding that school exclusion can lead to increased individual and community risk); *see also* Russell J. Skiba et al., *Office Referrals and Suspension: Disciplinary Intervention in Middle Schools*, 20 EDUC. & TREATMENT OF CHILDREN 295, 311 (1997) (finding that students are treated differently in different classes).

[279] Wu et al., *supra* note 253, at 255–56.

The key is to constructively engage students. Schools with low suspension rates use "prevention strategies to curtail inappropriate behavior (e.g., social skills training for students, behavior management training for teachers)," get parents involved "in the development of the school-wide discipline plan," and believe "that responding to students' needs and treating them with respect is effective in reducing problematic behavior."[280] The general consensus of the research community is that positive behavioral supports, not punitive responses, are the most effective way to address student misbehavior.[281] Likewise, misbehavior is often a coping mechanism for students struggling to overcome academic challenges, not a sign of bad behavior per se.[282] The way to address an academic challenge is to provide academic support.[283] Exclusion just makes matters worse.[284]

The foregoing sophisticated analysis of school discipline and student achievement has the potential to entirely reframe the nature of discipline problems. It shows that student misbehavior is not just about students making bad choices or schools overreacting to those choices. Student misbehavior is contextual and depends on the quality of the social and academic environment. Likewise, students' academic achievement is not just about how hard students study or how qualified their teachers are. Academic achievement is a function of the social and disciplinary environment in the school. Understood this way, states and schools have far more leverage to improve discipline and academic outcomes than one

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[280] Mendez et al., *supra* note 154, at 273–74.

[281] Nance, *supra* note 14 (surveying and discussing the literature on positive behavioral supports and noting that the benefits have been verified in thousands of schools).

[282] VERN JONES & LOUISE JONES, COMPREHENSIVE CLASSROOM MANAGEMENT: CREATING COMMUNITIES OF SUPPORT AND SOLVING PROBLEMS (7th ed. 2004); João Lopes, *Intervention with Students with Learning, Emotional, and Behavior Disorders: Why Do We Take So Long to Do It?*, 28 EDUC. & TREATMENT OF CHILDREN 345, 348–49 (2005); J. Ron Nelson et al., *Academic Achievement of K-12 Students with Emotional and Behavioral Disorders*, 71 EXCEPTIONAL CHILDREN 59, 67–68 (2004); Heather E. Sterling-Turner et al., *Functional Assessment of Distracting and Disruptive Behaviors in the School Setting*, 30 SCH. PSYCHOL. REV. 211, 219–221 (2001) (discussing a case study of a child acting out to avoid difficult tasks).

[283] *See, e.g.*, *CFE II*, 801 N.E.2d 326, 337 (N.Y. 2003) (explaining that sound basic education "must still 'be placed within reach of all students,' including those who 'present with socioeconomic deficits'"); Hoke Cty. Bd. of Educ. v. State, 599 S.E.2d 365, 389 n.16 (N.C. 2004) (discussing at-risk students whom the state was obligated to assist); Abbeville Cty. Sch. Dist. v. State, 767 S.E.2d 157, 179 (S.C. 2014) (emphasizing the state's duty to assist "school districts filled with students of the most disadvantaged socioeconomic background").

[284] The students fall further behind and the chances of dropping out increase dramatically. ROBERT BALFANZ ET AL., SENT HOME AND PUT OFF-TRACK: THE ANTECEDENTS, DISPROPORTIONALITIES, AND CONSEQUENCES OF BEING SUSPENDED IN THE NINTH GRADE (Dec. 21, 2012), http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/state-reports/sent-home-and-put-off-track-the-antecedents-disproportionalities-and-consequences-of-being-suspended-in-the-ninth-grade/balfanz-sent-home-ccrr-conf-2013.pdf [https://perma.cc/W5YE-S7GC].

might otherwise assume. In fact, schools are and have been leveraging their power for some time. The problem is that they have too often used that leverage to suspend and expel students,[285] which has undermined both the discipline climate and academic achievement.

3. The Racial Achievement Gap as a Function of Discipline.—Harsh discipline policies potentially pose academic impediments for all students and schools. Schools, however, do not administer discipline evenly across demographic groups and schools. Most notably, African-Americans are suspended at anywhere from two to five times as often as white students, depending on the particular state and school.[286] These higher suspension rates, combined with the differing disciplinary climate in predominantly minority schools, fuel the racial achievement gap. In 2015, for instance, the U.S. Department of Education reported that African-American's math achievement lagged thirty-two points behind that of whites by the eighth grade on the National Assessment of Educational Progress—the equivalent of about three years' worth of learning.[287]

For decades, social science has attributed the racial achievement gap to poverty, segregation, and unequal access to resources.[288] No doubt, these factors still influence the achievement gap. But recent studies reveal that a substantial portion of the achievement gap is attributable to problematic discipline policy and practices, which just so happen to be more prevalent

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[285] *See generally* LOSEN ET AL., *supra* note 2, at 4 ("If we ignore the discipline gap, we will be unable to close the achievement gap. Of the 3.5 million students who were suspended in 2011-12, 1.55 million were suspended at least twice. Given that the average suspension is conservatively put at 3.5 days, we estimate that U.S. public school children lost nearly 18 million days of instruction in just one school year because of exclusionary discipline.").

[286] EDWARD J. SMITH & SHAUN R. HARPER, DISPROPORTIONATE IMPACT OF K-12 SCHOOL SUSPENSION AND EXPULSION ON BLACK STUDENTS IN SOUTHERN STATES (2015), http://www.gse.upenn.edu/equity/sites/gse.upenn.edu.equity/files/publications/Smith_Harper_Report.pdf [https://perma.cc/R9RT-WGG7].

[287] NATIONAL CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2016, at 152 fig.3 (2016), http://nces.ed.gov/pubs2016/2016144.pdf [https://perma.cc/5Y9K-C828] (showing the gap); CHRISTOPHER LUBIENSKI & SARAH THEULE LUBIENSKI, NAT'L CTR. FOR THE STUDY OF PRIVATIZATION IN EDUC., CHARTER, PRIVATE, PUBLIC SCHOOLS. AND ACADEMIC ACHIEVEMENT: NEW EVIDENCE FROM NAEP MATHEMATICS DATA 5 (2006), http://epsl.asu.edu/epru/articles/EPRU-0601-137-OWI.pdf [https://perma.cc/9RM3-BPG4] (explaining that ten scaled points on the National Assessment of Educational Progress is roughly equivalent to one year of learning).

[288] *See, e.g.*, NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2009, at 153 app.A, tbl.A-12-2, 157 tbl.A-13-2 (2009) http://nces.ed.gov/pubs2009/2009081.pdf [https://perma.cc/2ZMZ-5BL5] (revealing achievement gaps between white and black students equivalent to nearly two years of learning); JAMES S. COLEMAN ET AL., DEP'T OF HEALTH, EDUC., & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY 21–22 (1966), http://eric.ed.gov/?id=ED012275 [https://perma.cc/WW99-LNL9] (attributing achievement gap to socioeconomic segregation); C. Kirabo Jackson et al., *The Effect of School Finance Reforms on the Distribution of Spending, Academic Achievement and Adult Outcomes*, Q.J. ECON (forthcoming 2016), www.nber.org/papers/w20118 [https://perma.cc/FKP3-N53F] (attributing achievement gaps to resource inequalities).

in predominantly poor and minority schools.[289] As a result, African-Americans, on average, confront a disciplinary environment that depresses rather than improves student achievement. Based on these findings, the solution to harsh and counterproductive discipline may also be a solution, in part, to the racial achievement gap—two issues often considered separately.[290]

Given the complexity of the analysis, the research on these points is relatively new and scarce. However, two major studies offer compelling findings.[291] The first study reached the general finding that the percentage of low- or middle-income students in a school strongly correlates with the disciplinary climate and academic achievement in that school.[292] Therefore,

> if the extent of segregation in school districts or communities increases, . . . there will be an increase in the variation of both disciplinary climate and academic achievement at the school level. In schools where advantaged students are concentrated, there will be fewer discipline problems and higher achievement levels, whereas schools serving disadvantaged students will have even worse discipline problems and lower levels of academic achievement.[293]

The second study, by Richard Arum and Melissa Velez, confirmed this finding,[294] but went much further in its analysis and conclusions. Arum and Velez attempted to quantify the extent to which the general racial achievement gap is attributable to discipline. Although an exact answer is

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[289] *See infra* notes 291–311.

[290] *See, e.g.*, ADVANCEMENT PROJECT ET AL., EDUCATION ON LOCKDOWN, *supra* note 220, at 7–8 (framing discipline issues in terms of school pushouts and juvenile justice involvement, not academic achievement); CTR. FOR EDUC. POLICY ANALYSIS, *Racial and Ethnic Achievement Gaps*, THE EDUC. OPPORTUNITY MONITORING PROJECT, http://cepa.stanford.edu/educational-opportunity-monitoring-project/achievement-gaps/race/ [https://perma.cc/ZY2F-YNWB] (indicating much of the achievement gap is attributable to poverty factors, but listing several other nondiscipline-related education policies that may make matters worse—"the availability and quality of early childhood education, the quality of public schools, patterns of residential and school segregation, and state educational and social policies").

[291] Another less sophisticated study preceded the two studies discussed above the line, but reached consistent results. In 1989, Valerie Lee and Anthony Bryk found that the average achievement gap between African-Americans and whites was smaller in Catholic schools than public schools, but the difference between the schools

> disappeared once we took into account the disciplinary climate of schools. The minority gap is largest in schools in which there is a high incidence of disciplinary problems. This finding suggests that the minority gap is smaller in the Catholic sector because the environments are more orderly and less disruptive.

Lee & Bryk, *supra* note 249, at 185.

[292] Ma & Willms, *supra* note 273, at 185.

[293] *Id.*

[294] Arum & Velez, *supra* note 33, at 298 ("[S]chools with more than 50 percent of students from economically disadvantaged homes have significantly higher levels of principal reports of disciplinary disengagement.").

elusive given the number of factors involved in the gap, they were able to link discipline and the racial achievement gap.

They first replicated the longstanding research findings regarding the negative effects of attending a high-poverty school on student achievement, regardless of an individual student's race or socioeconomic status, and the positive effects of attending a middle-income school.[295] They also accepted the premise in that literature that differences in peer-to-peer learning, the ability to recruit high quality teachers, and other related factors drive the achievement gap between high- and low-poverty schools.[296] But Arum and Velez found that there was a potentially even more important difference between schools: "a large and significant component of the negative effects of attending economically disadvantaged schools on test score performance is associated with the dysfunctional disciplinary climates that exist there."[297]

The average African-American student attends a school in which 59% of his peers are low income.[298] Arum and Velez found that these predominantly poor schools are more likely to have dysfunctional discipline environments than other schools.[299] This tendency of predominantly poor schools combined with the fact that African-Americans are consigned to them at a much higher rate than whites means that African-Americans are exposed to a very different disciplinary environment than whites.[300] This differential exposure, according to Arum and Velez, largely explains the racial achievement gap. They found that nearly half of the achievement gap that researchers normally attribute to segregation is cancelled out when disciplinary measures are considered.[301]

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[295] COLEMAN ET AL., *supra* note 288, at 21–22; RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 47–76 (2001); Geoffrey D. Borman & Maritza Dowling, *Schools and Inequality: A Multi-Level Analysis of Coleman's Equality of Educational Opportunity Data*, 112 TEACHERS COLLEGE RECORD 1201, 1201–02 (2010).

[296] Arum & Velez, *supra* note 33, at 279–81.

[297] *Id.* at 302.

[298] GARY ORFIELD, REVIVING THE GOAL OF AN INTEGRATED SOCIETY: A 21ST CENTURY CHALLENGE 14 (2009), http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/reviving-the-goal-of-an-integrated-society-a-21st-century-challenge/orfield-reviving-the-goal-mlk-2009.pdf [https://perma.cc/3TKF-YCDK].

[299] Arum & Velez, *supra* note 33, at 295, 297–98 (finding that socioeconomically disadvantaged schools have classroom disruptions that are a standard deviation higher than other schools, and also have poorer climates and less disciplinary engagement by staff and administrators).

[300] *Id.* at 298.

[301] Arum & Velez, *supra* note 33, at 302 (finding that 45% of the variance in the achievement between African-Americans attending high- and low-poverty schools is attributable to the differences in the disciplinary environment in those schools). Some variance in achievement persisted even after accounting for differences in the disciplinary environment, but the study found the remaining variance was statistically insignificant. *Id.* at 317.

In a separate analysis, they also found that in more orderly environments, the racial achievement gap is "diminished to nearly zero" (after controlling for demographic factors).[302] In sum, Arum and Velez's study suggests decades of social science documenting the negative interaction between segregation and the academic achievement of African-Americans is explained by the fact that African-Americans generally experience disciplinary climates that depress academic achievement at much higher rates than whites.[303]

Another recent study sought to quantify the academic effects of differential discipline within individual schools. In 2016, Edward Morris and Brea Perry published what they call "the first comprehensive study of the impact of suspension on racial differences in achievement."[304] They found that "school suspensions account for approximately one-fifth of black–white differences in school performance."[305]

This connection proceeds from three straightforward subsidiary factual findings. First, African-American students are far more likely to be suspended than other students. In the schools studied, African-Americans were "7.57 times as likely to be suspended as white students."[306] While this disparity could be partially explained by differences in socioeconomic status, eligibility for special education, and whether a student lived with a two-parent family, these factors could not cancel out the disparity. Accounting for all available factors, "black students are still estimated to be nearly two and a half times as likely to be suspended as white students."[307]

Second, "[s]tudents who have been suspended score substantially lower on end-of-year academic progress tests than those who have not, and even students with a propensity to be suspended perform worse in years where they are suspended relative to years when they are not."[308] Third, the negative effects of the initial suspension compound over time and set "into motion a trajectory of poor performance that continues in subsequent years, even if a student is not suspended again."[309] Over the course of two years, the average student who did not experience a suspension experienced a six-point increase in achievement on end-of-year exams, while students who

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[302] *Id.* at 317.

[303] *Id.* at 320.

[304] Edward W. Morris & Brea L. Perry, *The Punishment Gap: School Suspension and Racial Disparities in Achievement*, 63 SOCIAL PROBLEMS 68, 71 (2016).

[305] *Id.* at 68.

[306] *Id.* at 76.

[307] *Id.* at 77.

[308] *Id.* at 82.

[309] *Id.*

experienced a single suspension actually regressed by one point during that same period.[310] The authors conclude that these findings demonstrate that the racially "unequal suspension rate is one of the most important factors hindering academic progress and maintaining the racial gap in achievement."[311]

In sum, the foregoing studies suggest that the academic impacts of discipline policies and practices are strong and that they explain a substantial amount of the achievement gap. Differences in the disciplinary environments between predominantly poor and predominantly middle-income schools explain a substantial amount of the achievement gap between those schools. Moreover, even within individual schools, differential rates of suspension explain a substantial portion of the achievement gap between students, as the decision to suspend a student will widen whatever achievement gap may already exist between that student and others.

B. Situating School Discipline Research Within School Finance Frameworks

Social science connecting educational outcomes with discipline policies directly intersects with the state's obligation to ensure that schools are delivering adequate and equal educational opportunities, particularly for disadvantaged students. A state's obligations to provide schools with sufficient funding, teachers, curriculum, and facilities to ensure adequate educational opportunities is theoretically no different than an obligation to manage and implement effective discipline policies. The existence of a positive disciplinary environment, just like the presence of quality teachers, will determine whether many students achieve on grade level and graduate. Conversely, just like ineffective teaching, a lack of engaging curriculum, or dangerous facilities, a negative disciplinary environment will increase students' chances of academic failure, suspension, and eventually dropping out of school.

When schools combine negative disciplinary environments with high percentages of at-risk students, the results are often catastrophic. The gap between the academic outcomes in these schools and others is significant. Even for the well-behaved students, the chance of receiving a quality education and achieving academic success are low. While these

[310] *Id.* at 79–80. "Suspended students have lower baseline scores than never-suspended students, on average, possibly reflecting other unmeasured mechanisms of student success that are correlated with suspension," but suspension widens this gap from "only a three-point deficit relative to those without a suspension" to a nine-point gap after two years. *Id.*

[311] *Id.*

achievement gaps have been central to past litigation, school discipline and the environmental climate have largely been ignored as causal factors. Until school quality litigation accounts for discipline, it will too often fall short of ensuring the quality and equal education opportunities it pursues.

Unlike the theory in Part II, this claim does not depend on the existence of a constitutional right to education. Rather, this claim rests on the state's duty to deliver adequate and equal educational opportunities. Where that duty exists, plaintiffs can challenge ineffective discipline policy by establishing four additional points. First, plaintiffs must show that the duty to deliver an adequate or equal education includes the duty to maintain effective discipline policies. Second, plaintiffs must show that ineffective disciplinary environments cause a substantial educational harm. Third, plaintiffs must show that the state, rather than students or some other factor, cause that harm. Fourth, plaintiffs may also need to demonstrate that strategies are available to reduce or eliminate the harm. These steps do not require plaintiffs to develop new doctrine, but simply to make an evidentiary case connecting discipline policies and data to school quality and student achievement.

1. The Constitutional Duty Includes Discipline.—Plaintiffs in discipline cases, like those in school finance and quality cases, could base their claim on access to an adequate or equal education. Even without establishing an individual personal constitutional right to education, plaintiffs could base their claim on the state's constitutional duty to deliver education. All state constitutions include this duty.[312] The only variance among states is whether the state supreme court enforces that duty.[313] So long as plaintiffs brought a claim in a state that exercised that authority, establishing an educational duty that the courts will enforce is not a barrier to pursuing a discipline claim.

The question would then be whether discipline policy and practice fall within this duty. This question is both doctrinal and empirical. As to doctrine, Section II.B demonstrates adequacy and equity precedent is sufficiently broad to cover almost any education policy or practice that significantly affects educational outcomes. Courts have entertained adequacy and equity claims ranging from challenges to school district boundaries and segregation, teacher tenure, limited access to charter schools, low teacher salaries, school funding, and the absence of pre-

[312] Thro, *supra* note 21.

[313] Weishart, *supra* note 184. In those states where courts do not enforce this duty, plaintiffs would presumably be unable to challenge discipline policy. *See*, *e.g.*, Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1196 (Ill. 1996); Scott v. Commonwealth, 443 S.E.2d 138, 142 (Va. 1994).

kindergarten education.[314] Discipline policy, insofar as it can entirely cut short the education of misbehaving students and determine the quality of the learning environment for other students, easily fits in the category of education policies that affect education outcomes.[315] Thus, as a matter of doctrine, plaintiffs can raise it.

The more difficult question is the empirical one of whether discipline policy causes education harms that are substantial and systemic enough to rise to a deprivation of an adequate or equal education.[316] If so, a court might order an affirmative remedy by the state.[317] If not, a court would likely find that the state has not breached its duty.[318] The following Sections explore this empirical question and its subsidiary inquiries in detail.

2. Establishing the General Causal Connection Between Discipline and Educational Opportunities.—The most challenging empirical showings in cases claiming that the state has failed to deliver equal or adequate educational opportunities all center around issues of causation. When plaintiffs challenge some particular deficiency in their education, they must establish that (1) the deficiency has a causal impact on educational opportunity; (2) that the impact is substantial enough to conclude that students have been denied an equal or adequate education; and (3) that the state, rather than some other factor, has caused or is in some way responsible for the deficiency.

For instance, past cases have often alleged that students have been deprived of an adequate education because of the poor teaching quality in

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[314] *See supra* notes 80–87.

[315] As Kevin Welner reasons, if the constitutional challenge to teacher tenure fits within existing precedent regarding the fundamental right to education, "[o]ther lawsuits might challenge laws and policies that result in inequities in class size, access to high-quality preschool, grade retention, exclusionary discipline, access to enriched and engaging curriculum, transportation, buildings and facilities, funding formulas, access to and use of technology, testing and accountability policies, and school choice policies." Kevin G. Welner, *Silver Linings Casebook: How* Vergara*'s Backers May Lose by Winning*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 121, 141 (2015).

[316] *See, e.g.*, Serrano v. Priest, 226 Cal. Rptr. 584, 606 (Cal. Ct. App. 1989) (indicating "[a]n insubstantial burden" is insufficient to trigger heightened scrutiny); Sheff v. O'Neill, 678 A.2d 1267, 1287 (Conn. 1996) (requiring more than a "de minimus" injury); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 197 (Ky. 1989) (examining inequities throughout 177 local school districts); McDuffy v. Sec'y of Exec. Office of Educ., 615 N.E.2d 516, 519–22 (Mass. 1993) (examining violations spanning across twelve districts).

[317] *See, e.g.*, DeRolph v. State, 677 N.E.2d 733, 745 (Ohio 1997) (directing the state to ensure an appropriate student–teacher ratio); Campbell Cty. Sch. Dist. v. State, 907 P.2d 1238, 1279 (Wyo.), *as clarified on denial of reh'g*, (Wyo. 1995) (directing the state to "achieve financial parity," conduct a study of "a new funding system," "describe what a 'proper education' is," set "meaningful standards for course content and knowledge attainment," and assess student progress).

[318] *See, e.g.*, Vergara v. State, 202 Cal. Rptr. 3d 262 (Cal. Ct. App. 2016) (overturning trial court decision in favor of plaintiffs), *as modified*, 2016 WL 4443590 (Cal. Ct. App. May 3, 2016), *reh'g denied*, 2016 WL 4443590 (Cal. Ct. App. Aug. 22, 2016).

their school or district.[319] Those plaintiffs substantiated their case by showing that teacher quality correlates with student achievement, that teacher quality is one of the most important variables in student achievement, that uncertified and unqualified teachers are prevalent in schools with poor academic outcomes, and that the reason for these teaching inadequacies is the state's funding policy.[320]

Showings of this sort are typically made through a combination of social science studies, locally generated data, and statistical analysis. These studies and data rarely establish causation in any absolute sense, but they offer the circumstantial evidence upon which a court can infer causation.[321] This inference is most important on the general questions of whether an educational input or policy correlates with educational outcomes. Based on a strong correlation, a court can infer that an input, such as teacher quality, has a causal effect on achievement, graduation rates, or some other education outcome.[322] Once a court makes this causal inference, the other factual and causal inquiries are more straightforward. If plaintiffs establish that teacher quality affects education outcomes as a general matter, it might be enough for plaintiffs to show that certain schools are exposed to high numbers of low-quality teachers, that achievement in those schools is low, and that some state policy prevents these schools from improving their teacher quality.[323]

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[319] *See, e.g.*, Leandro v. State, 488 S.E.2d 249, 255 (N.C. 1997); Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247, 261 (N.D. 1994); *DeRolph*, 677 N.E.2d at 744.

[320] *See* Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 498–99 (Ark. 2002) (noting that "[w]ell-paid and well-motivated teachers are what make the education engine run," but that they are not paid equally across the state); *Rose*, 790 S.W.2d at 198 ("[T]here is great disparity in the poor and the more affluent school districts with regard to classroom teachers' pay."); *CFE II*, 801 N.E.2d 326, 333 (N.Y. 2003) (noting that teachers are the most important input for positive student outcomes).

[321] *See, e.g.*, *CFE II*, 801 N.E.2d at 340 ("The trial court reasoned that the necessary 'causal link' between the present funding system and the poor performance of City schools could be established by a showing that increased funding can provide better teachers, facilities and instrumentalities of learning. . . . We agree that this showing, together with evidence that such improved inputs yield better student performance, constituted plaintiffs' prima facie case, which plaintiffs established.").

[322] *See, e.g.*, *id.* at 334 ("[W]e agree with the trial court's holdings that teacher certification, test performance, experience and other factors measure quality of teaching; that quality of teaching correlates with student performance"); *CFE I*, 655 N.E.2d 661, 667 (N.Y. 1995) (equating a "correlation between funding and educational opportunity" with a "causal link").

[323] *See, e.g.*, Abbeville Cty. Sch. Dist. v. State, 767 S.E.2d 157, 171 (S.C. 2014) (finding a deprivation of a minimally adequate education based on evidence that plaintiffs' districts had higher rates of teachers who were on temporary contracts or had failed a certification test, without requiring evidence that those rates strongly correlated with lower student achievement), *reh'g denied*, (S.C. 2015). It is also worth noting that some courts, while requiring causation, do not require sophisticated statistical analysis to establish it. Some courts accept the commonsense notion that certain key education resources such as teachers and textbooks affect the education students receive and, thus, state policies that create unequal or inadequate access to these resources deprive students of the constitutionally required education. *See, e.g.*, Serrano v. Priest, 557 P.2d 929, 939 (Cal. 1976); Hargrave v. Kirk, 313 F. Supp. 944, 947 (M.D. Fla. 1970), *vacated sub nom.*, Askew v. Hargrave,

In discipline, this would likely entail demonstrating that suspension affects educational opportunities, those effects are substantial enough to deprive students of an equal or adequate education, and that the state, rather than students, are responsible for problematic discipline policies and high suspension rates. The first point—that suspension affects educational opportunities—is addressed in this Section, and the second and third points regarding the level of harm caused and the party responsible for it are addressed in the next two Sections.

Broad-scale studies showing that negative climates and high suspension rates correlate with lower student achievement should be sufficient for a court to make the general causal inference that high suspension rates and disorderly environments affect educational opportunity. For instance, studies show that a single suspension can eliminate any educational progress a student would have made for the year and that when this effect is compounded across a school with a high suspension rate, the overall achievement of the entire student body—including suspended and nonsuspended students—is depressed.[324] Likewise, studies show that students in schools with better disciplinary environments tend to score better than they otherwise would if they were in schools with problematic disciplinary environments.[325] These are the exact types of effects that have sufficed in cases challenging teacher quality, segregation, unequal funding, and other education policies.[326]

Jason Nance's recent synthesis of discipline studies also offers a qualitative explanation for the connection between discipline and the overall educational quality of a school. He explains:

> When teachers employ a varied-instructional approach that incorporates activities that target different learning styles and students' needs; capture the students' interests by making the material relevant to their lives; help students understand what is possible through cooperation and coordinated action with

401 U.S. 476 (1971); *see also* Derek W. Black, *Civil Rights, Charter Schools, and Lessons to Be Learned*, 64 FLA. L. REV. 1723, 1743–46 (2012) (discussing some courts' simplistic approach to causation).

[324] *See supra* notes 248–75.

[325] *See* Rausch & Skiba, *supra* note 8 (surveying past literature on the academic consequences of discipline and reaching new empirical findings to the same effect).

[326] *See, e.g.*, Sheff v. O'Neill, 678 A.2d 1267, 1287–88 (Conn. 1996) (finding that racial isolation is harmful to students and is a constitutional violation); Montoy v. State, No. 99-C-1738, 2003 WL 22902963, at *49 (Kan. Dist. Ct. Dec. 2, 2003) ("[T]he Court was persuaded, as a matter of fact, by the evidence that there is a causal connection between the poor performance of the vulnerable and/or protected categories of Kansas students and the low funding provided their schools."); *CFE II*, 801 N.E.2d at 334 (correlation between teaching quality and student performance sufficient evidence of deprivation of sound basic education).

> others; and have supportive, caring environments with clear behavioral expectations, teachers experience far fewer behavioral problems.[327]

In other words, schools that deliver a quality education generally do not have discipline problems, whereas those that deliver inadequate education do.

In some respects, this explanation might blur the causal inquiry, raising the question of the extent to which high suspension rates cause poor academic outcomes versus the extent to which poor educational quality causes high suspension rates and poor outcomes. These factors likely have reciprocal effects on one another and this possibility need not undermine plaintiffs' claim. To the contrary, it should strengthen them. First, as the strong connection between student achievement and discipline rates suggest, orderly and positive disciplinary environments are part of a quality education. In fact, this is the state's very premise for excluding some students.[328] Second, as a general matter, the state is responsible for both the quality of education it delivers and discipline policy outcomes.[329] The state should not escape its duty in regard to both by confounding the distinctions between them. Finally, while education quality and suspensions surely interact, studies show that when holding all other things equal, the decision to police student behavior primarily through suspension correlates with lower academic outcomes.[330] This alone should be sufficient for courts to infer the general causal connection between discipline and education outcomes.

3. Demonstrating the Effects of Discipline Policies Rise to the Level of a Constitutional Harm.—The next step is to show the effect of discipline is substantial and systematic enough to independently or in conjunction with other policies deprive students of an adequate or equal education. As to an individual student who is expelled, the substantiality of the harm is obvious, but the systematic problem is not necessarily so. The issue for the broader claim that the state has failed to carry out its education

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[327] Nance, *supra* note 14, at 347.

[328] *See, e.g.*, Leonard v. Sch. Comm., 212 N.E.2d 468, 472 (Mass. 1965) (upholding exclusion of student based on his haircut because school believed it was necessary to protect order and classroom decorum); *In re* Jackson, 352 S.E.2d 449, 455 (N.C. Ct. App. 1987) ("A student's right to an education may be constitutionally denied when outweighed by the school's interest in protecting other students, teachers, and school property, and in preventing the disruption of the educational system.").

[329] Precedent clearly establishes state responsibility for educational quality. *See, e.g.*, Rose v. Council for Better Educ. Inc., 790 S.W.2d 186, 216 (Ky. 1989); Opinion of the Justices (Reformed Pub. Sch. Fin. Sys.), 765 A.2d 673, 676 (N.H. 2000) ("The State may not shift any of this constitutional responsibility to local communities . . . ."). And as Section III.B.4 will establish, discipline outcomes are a result of the state's actions and inactions.

[330] *See supra* notes 248–75.

duty is whether discipline policies systematically affect the delivery of education beyond individual students (or classrooms) and whether those systematic effects deprive students of an adequate or equal education. For instance, in the challenge to teacher tenure discussed in Section I.B.4, plaintiffs had alleged that teacher tenure caused grossly ineffective teachers to remain in the classroom, thereby depriving students of equal educational opportunities.[331] Plaintiffs put forth general evidence to substantiate the causal connection between teacher quality and educational outcomes, as well as evidence that tenure presents barriers to the removal of teachers.[332] But the state appellate court rejected plaintiffs' claim, reasoning that plaintiffs failed to show that tenure policies had systematically resulted in the retention of grossly ineffective teachers or that these teachers whom tenure protected were concentrated in particular schools.[333]

Demonstrating a systematic problem in regard to school discipline should be simple. Evidence of substantial numbers of districts and/or schools with unusually high discipline rates is readily available in many states. While an acceptable or appropriate suspension rate is an elusive concept, the 2011–12 national suspension rate of 10%—which still is well above rates from the 1970s and 1980s—offers a reasonable if not conservative baseline for the purposes of this Article.[334] In South Carolina, for instance, plaintiffs might point to the fact that one out of five schools have suspension rates that are double or more than double the national average.[335] And about twenty schools have suspension rates so high—from 50 to more than 100 percent—that relatively few students in those schools escape punishment over the course of the year.[336] Analogous systematically high rates can be found in several other states.[337]

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[331] Vergara v. State, 202 Cal. Rptr. 3d 262 (Cal. Ct. App. 2016), *as modified* 2016 WL 4443590 (Cal. Ct. App. May 3, 2016), *reh'g denied,* 2016 WL 4443590 (Cal. Ct. App. Aug. 22, 2016).

[332] *Id.* at *5–6.

[333] *Id.* at *15–16.

[334] *See* LOSEN ET AL., *supra* note 2, at 4 (identifying the national rate). Relying on the average suspension rate is also consistent with the findings that suspension rates below average are associated with modest increases in student achievement, but that suspension rates above the average are associated with substantial decreases in student achievement. Perry & Morris, *supra* note 11, at 1076.

[335] *Search Student Expulsion and Suspension Data, School Year 2009–10*, EDUC. WK. (Jan. 4, 2013), http://www.edweek.org/ew/qc/2013/search-ocrdata.html [https://perma.cc/5F67-WRLV].

[336] *Id.*

[337] In 2009, for instance, approximately one out of three school districts in Alabama had high school suspension rates of 20% or higher. Calculations based on *Elementary and Secondary School Suspension Rates by State, Spreadsheet: Secondary Trends 2011–12*, CTR. CIVIL RIGHTS REMEDIES, http://www.schooldisciplinedata.org/ccrr/resultsstate.php?us_state=AL&searchtype=raceonly&numState=1 [https://perma.cc/75BD-4REK]. In North Carolina, one out of four districts fell in this category. *Id.*; *see also* LOSEN ET AL, *supra* note 2, at 23–24 tbl.7 (listing twenty-two states with statewide suspension rates in excess of 10% in secondary schools).

The more complicated question is whether the systematic use of suspension and its effects are substantial enough to amount to the difference between delivering an adequate and inadequate education. Because current social science studies are rarely framed in these constitutional terms, they do not explicitly answer the question. The studies' findings, however, strongly suggest that schools with unusually high discipline rates deprive students of an adequate or equal education. For instance, Morris and Perry's study showed that average students made significant academic progress over the course of two years, but that students suspended once actually regressed.[338] Similarly, a West Virginia Department of Education study of its own data found that students "with one or more discipline referrals were 2.4 times more likely to score below proficiency in math than those with no discipline referrals; math proficiency among these students exhibited a 40 percentage point deficit."[339] Moreover, "[a]s the number of discipline referrals increased so did the odds of . . . scor[ing] below proficiency."[340] As a measure of whether students are receiving an adequate education, courts frequently ask whether substantial numbers of students are achieving below grade level.[341] For these students regressing rather than progressing, and at increased risk of scoring below proficient, the answer should easily be yes,[342] and when the suspension rate rises to 20% or 30% in particular schools and districts across a state, this substantial harm occurs systematically.

As emphasized in Part III, the harms of harsh discipline extend beyond just the suspended student. One study found that "[a]fter accounting for the influence of a school's poverty rate, out-of-school suspension is the next strongest predictor of [a school's overall] achievement. . . ."[343] Other studies would suggest that the systematic effects of high suspension rates on students who do not misbehave is substantial. As Perry and Morris wrote, in schools with above average suspension rates, the "adverse effect of school suspension [on non-suspended students]

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[338] Morris & Perry, *supra* note 236, at 79–81.

[339] ANDY WHISMAN & PATRICIA CAHAPE HAMMER, W. VA. DEP'T OF EDUC., THE ASSOCIATION BETWEEN SCHOOL DISCIPLINE AND ACADEMIC PERFORMANCE: A CASE FOR POSITIVE DISCIPLINE APPROACHES, at v (2014), http://wvde.state.wv.us/research/reports2014/TheAssociationBetweenSchoolDisciplineandMathematicsPerformance2014.pdf [https://perma.cc/SNJ9-WWDG].

[340] *Id*.

[341] Abbott v. Burke (*Abbott III*), 693 A.2d 417, 427–29 (N.J. 1997) (discussing achievement on standardized state tests and its relevance to the constitutionality of the school system); *CFE II*, 801 N.E.2d 326, 331 (N.Y. 2003); Hoke Cty. Bd. of Educ. v. State, 599 S.E.2d. 365, 382 (N.C. 2004).

[342] Moreover, Morris and Perry's study showed that suspended students were already achieving at levels below other students prior to their suspension. Morris & Perry, *supra* note 236, at 79–81. Rather than assist these students in making academic progress, suspension compounds the problem.

[343] RAUSCH & SKIBA, *supra* note 8, at 20.

becomes especially pronounced. . . ."[344] In schools with high suspension rates but otherwise low levels of violence, "the predicted percentile score in reading achievement decreases from about 54th at the mean level of suspension to 28th at very high levels of suspension. . . ."[345] Likewise, Arum and Velez's study emphasized that while a large achievement gap exists between high- and low-poverty schools, the gap is most pronounced between schools with orderly and disorderly disciplinary environments.[346] They further found that the achievement gap between high- and low-poverty schools dissipates (after controlling for other factors) when the disciplinary environment is orderly. For the purposes of this Article, discipline's effect on the achievement gap is crucial, as courts regularly cite statewide achievement gaps between minority students and whites, low-income students and middle-income students, and high-poverty schools and low-poverty schools as evidence of a deprivation of an adequate and equal education.[347]

In sum, statewide and school-level data on suspension rates combined with available social science can demonstrate that discipline policies have systemic and substantial effects on the delivery of an adequate and equal education. Substantial percentages of schools and districts suspend students well in excess of the national average. Once those suspension rates exceed the average, higher suspension rates correlate with lower academic achievement. That academic achievement is substantially lower for both the suspended and nonsuspended student and is of the sort courts have previously deemed as evidence of a constitutional harm.

4. State Responsibility for Discipline.—In addition to showing that some policy or practice has a causal effect on educational outcomes, plaintiffs must show state responsibility for the policy or practice.[348] For

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[344] Perry & Morris, *supra* note 11, at 1077.

[345] *Id*.

[346] *See, e.g.*, Arum & Velez, *supra* note 33.

[347] *See, e.g.*, Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 488–89 (Ark. 2002) (stating that test scores are a "serious problem"); Montoy v. State, 2003 WL 22902963, at *47 (Kan. Dist. Ct. Dec. 2, 2003) ("Kansas test results are informative and disturbingly telling."); Rose v. Council for Better Educ. Inc., 790 S.W.2d 186, 197 (Ky. 1989) ("[A]chievement test scores in the poorer districts are lower than those in the richer districts and expert opinion clearly established that there is a correlation between those scores and the wealth of the district."); Claremont Sch. Dist. v. Governor (*Claremont III*), 794 A.2d 744, 752 (N.H. 2002); *CFE I*, 655 N.E.2d 661, 666 (N.Y. 1995); Leandro v. State, 488 S.E.2d 249, 259 (N.C. 1997); Campbell Cty. Sch. Dist. v. State, 907 P.2d 1238, 1279 (Wyo. 1995) (identifying assessments as an element of adequacy, but finding low test scores alone do not indicate inadequacy). *But see* James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1231 (2008) (questioning the heavy reliance on test scores).

[348] *See, e.g.*, *CFE II*, 801 N.E.2d 326, 335 (N.Y. 2003) ("[P]laintiffs had to show that insufficient funding led to inadequate inputs which led to unsatisfactory results."); Hoke Cty. Bd. of Educ. v. State, 599 S.E.2d 365, 386 (N.C. 2004) ("It is one thing for plaintiffs to demonstrate that a large number of

instance, a plaintiff might demonstrate that a school district has low-quality teaching and that the instruction depresses academic outcomes, but the reasons for low-quality teaching might be numerous.[349] In many instances, the reasons are directly related to state level policy, such as insufficient state funding to recruit, retain, and train teachers.[350] In other instances, the reasons may be related to poor local implementation, such as wasting state funds on ineffective programs. In other instances, the reasons could have little to do with state policy or local implementation, but could be the result of some other outside factor, such as a longstanding community controversy over religion, gender, race, or politics. The key here is to show that the state is the cause of the harms that students suffer, not some factor beyond the state's control or responsibility.

In the context of discipline, while disorderly environments and high suspension rates may have causal effects on educational quality, plaintiffs would also need to demonstrate that the state was the cause of these disciplinary problems (unless the claim is only against the local school district). This causal showing will generate fierce disputes between plaintiffs and the state. Almost as a matter of standard practice in school quality and finance cases, the state disputes the causal connection between its policies and the educational outcomes plaintiffs are challenging. First, states have sought to rebut the notion that state funding policy is causally connected to educational quality or outcomes.[351] States argue that educational outcomes are more directly a product of student demographic variables and student effort.[352] Second, states have argued that, to the extent money matters, the state has provided districts with sufficient funds and

Hoke County students are failing to obtain a sound, basic public education. It is quite another for plaintiffs to show that such a failure is primarily the result of action and/or inaction of the State . . . .").

[349] For a full discussion of the complex and various causes of low quality teaching, see Derek W. Black, *Taking Teacher Quality Seriously*, 57 WM. & MARY L. REV. 1597 (2016).

[350] *See, e.g.*, *CFE II*, 801 N.E.2d at 334.

[351] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42–43 (1973) (questioning whether "there is a demonstrable correlation between educational expenditures and the quality of education"); *Abbott II*, 575 A.2d 359, 363 (N.J. 1990) (recognizing dispute over whether and how money matters); *see also* Rebell, *supra* note 21, at 1484–85 ("[W]hether money matters in education was directly considered by the state courts in thirty [school funding cases]. In twenty-nine of them, the courts determined that money does indeed matter.").

[352] Sheff v. O'Neill, 678 A.2d 1267, 1287 (Conn. 1996) ("[D]efendants stress . . . the significant role that adverse socioeconomic conditions play"); *CFE II*, 801 N.E.2d at 341 (arguing against the idea that "children come to the New York City schools ineducable, unfit to learn"); *Hoke Cty. Bd. of Educ.*, 599 S.E.2d at 386 ("[T]he State contended that the evidence showed . . . [t]hat if a cognizable group of students within Hoke County are failing to obtain a sound basic education, it is due to factors other than the educational offerings provided by the State.").

that the problem is local mismanagement.[353] For the most part, courts deciding these issues on the merits have rejected these arguments, but these issues are still contested today.[354]

The debate surrounding discipline would be no less intense, but the causal analysis potentially cleaner. The connection between disciplinary environments and educational outcomes is arguably stronger than the connection between money and education outcomes. With money, much depends on local variables and on how districts spend that money; thus, the connection between money and educational outcomes is far from absolute.[355] But discipline policy appears to have a more direct effect on educational outcomes than money.[356] With that said, creating a positive disciplinary environment and effectively reducing suspensions calls for a more complex remedy than just an increase in state funding.

This last point would offer the state a second opening to challenge its causal responsibility. In particular, the state might claim that students and/or misguided teachers, administrators, and school boards are the cause of misbehavior and negative environments. Shifting blame to students has obvious appeal. As noted in Section II.B, some courts already instinctively blame students and reason that suspensions and expulsions do not warrant heightened scrutiny because misbehaving students forfeit their education rights.[357] In the context of a school quality or equality claim, however, shifting blame to students is more difficult because the claim would be brought on behalf of not only misbehaving students, but innocent bystanders. On this basis, both the logic and rhetorical value of shifting blame onto students would disappear. Studies also indicate the state is simply wrong on the facts. While student misbehavior is a product of individual choice, it is heavily influenced by context.[358] Schools that foster

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[353] Serrano v. Priest, 226 Cal. Rptr. 584, 615 (Cal. Ct. App. 1986) (rejecting argument that state caused "no more than 10 to 30 percent" of disparities); *CFE II*, 801 N.E.2d at 343 (arguing that "inefficient management of personnel is the supervening cause . . . rather than the funding system").

[354] Rebell, *supra* note 21, at 1486 ("Only one court has clearly held that money does not matter.").

[355] *See generally* Black, *supra* note 323, at 1762–63 (discussing the variables in school funding and how they complicate causal questions).

[356] *Compare* BRUCE D. BAKER, ALBERT SHANKER INST., REVISITING THAT AGE-OLD QUESTION: DOES MONEY MATTER IN EDUCATION? 6 (2012), http://files.eric.ed.gov/fulltext/ED528632.pdf [https://perma.cc/9RT2-CBU9] (finding in new studies "a positive, statistically significant (though at times small) relationship between student achievement gains and financial inputs"), *with* Perry & Morris, *supra* note 11, at 1077 (indicating the effect of discipline on student achievement is "especially pronounced").

[357] Doe v. Superintendent of Sch., 653 N.E.2d 1088, 1096 (Mass. 1995); Kolesnick *ex rel.* Shaw v. Omaha Pub. Sch. Dist., 558 N.W.2d 807, 813 (Neb. 1997); *In re* RM, 102 P.3d 868, 874 (Wyo. 2004) ("[S]tudent can[] temporarily forfeit educational services through his own conduct.").

[358] *See, e.g.*, RAUSCH & SKIBA, *supra* note 8, at 22; Wu et al., *supra* note 253.

negative policies and climates, in effect, cause a certain percentage of additional misbehavior and a certain percentage of lower achievement.[359] So long as a court accepted the evidence that school climate influences behavior and academics, plaintiffs should be able to establish the causal connection between state policy, school discipline, and educational outcomes.

A state's claim that local school actors are to blame should be even easier to reject. As prior courts have emphasized, the duty to ensure an adequate or equal education ultimately rests on the state.[360] If problematic decisions or circumstances are occurring locally, the state has a responsibility to identify and correct them.[361] The discipline problem in many districts does not stem from bad actors per se. It often results from a lack of capacity to deal constructively with and understand the causes of misbehavior.[362] In this respect, local discipline policies are directly tied to the support the state provides—or fails to provide.

Insofar as school climate and discipline are central to educational outcomes, they are part of the educational program the state must support and fund, just as it would teacher training and certification programs and requirements. With discipline, however, many states have incentivized and mandated harsh responses to discipline rather than supporting more constructive approaches. For instance, in South Carolina, state statutes authorize schools to suspend or expel students for the violation of any school board rule,[363] with no suggestion that better alternatives are available. Likewise, in Mississippi, a state statute authorizes districts to expel students after three instances of "disruptive behavior."[364] Those states that do not mandate or directly incentivize harsh discipline responses delegate so much discretion to local districts that nothing restrains those districts from making bad decisions.

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[359] *See, e.g.*, ARUM, *supra* note 241, at 182 (finding students more willing to defy authority in overly harsh discipline regimes); Ma & Willms, *supra* note 273, at 170 (finding student behavior varied based on school characteristics).

[360] Rose v. Council for Better Educ. Inc., 790 S.W.2d 186, 216 (Ky. 1989) ("[T]he *sole responsibility* for providing the system of common schools lies with the General Assembly."); *CFE II*, 801 N.E.2d 326, 344 (N.Y. 2003) ("[T]he State has ultimate responsibility for the schools . . . ."); Hoke Cty. Bd of Educ. v. State, 599 S.E.2d 365, 389 (N.C. 2004) (holding state ultimately responsible for the education local school boards provide).

[361] *Supra* note 360.

[362] IRA GLASS, 538: IS THIS WORKING? (Oct. 17, 2014) (transcript), http://www.thisamericanlife.org/radio-archives/episode/538/transcript [https://perma.cc/9ABN-BR8H] (revealing through discussions with teachers that many of them are just winging it).

[363] S.C. CODE ANN. § 59-63-210(A) (2013) (authorizing expulsion for the violation of any school board rule).

[364] MISS. CODE ANN. § 37-11-18.1 (2014) (authorizing expulsion for disruptive students).

Either way, responsibility for high levels of suspension and expulsion falls on the state. On the one hand, the state actively promotes problematic discipline environments with statutes of the sort described above. On the other, it ignores the importance of maintaining a positive and supportive disciplinary environment and leaves its agents—school districts and administrators—to fend for themselves. In both instances, the state is creating the conditions for negative discipline environments to occur. Thus, the response to a state's attempt to cast blame on districts would be simple: the state is both vicariously and directly responsible for negative climates that persist in school districts.[365]

5. Viable Remedies.—Courts may require plaintiffs to demonstrate the state can actually fix the identified problems. Here, many of the issues that came up with causation can resurface. For instance, even if the state is responsible for the conditions that incentivize bad behavior, what, if any, tools does the state have to actually improve school climates and reduce student misbehavior? The short answer is that while the state cannot stop misbehavior altogether, research shows that it has tools to minimize it.

The research on alternatives to school exclusion consistently shows that states can improve climates and reduce misbehavior. First, as Jason Nance writes in his review of the literature, "[p]erhaps the most important initiative that lawmakers can support and educators can implement . . . [to avoid] extreme disciplinary measures is to improve the strength and quality of classroom activities and the classroom management skills of teachers."[366] This remedial step, again, points back to the fundamental connection between educational quality and discipline outcomes.

Second, states can adopt discipline programs that are explicitly non-punitive. States can do this through one of two major categorical approaches: restorative justice, or positive behavioral supports and interventions. Restorative justice is premised on the notion that when a student misbehaves, the student harms others in the school community. Rather than punish the student, restorative justice asks that the student communicate with those he or she has harmed and identify ways to repair the harm and resolve any conflict. Studies have shown that these programs

[365] This is not to say that states have uniformly ignored the problem. Some have taken important first steps in the direction this Article proposes. *See, e.g.*, MINN. DEP'T OF EDUC., RESTORATIVE PRACTICES, http://education.state.mn.us/MDE/dse/safe/clim/prac/ [https://perma.cc/RRH2-C6U4]. Regardless of whether these steps are sufficient to resolve the discipline problem in a particular state, the fact that some have demonstrates the ability of other states to do the same.

[366] Nance, *supra* note 14, at 346.

can dramatically reduce the incidence of interpersonal conflicts in schools and improve the overall environment as a result.[367]

Positive behavioral intervention and support programs "aim[] to alter the school environment by creating improved systems (e.g., discipline, reinforcement, data management) and procedures (e.g., office referral, training, leadership) that promote positive change in staff behaviors, which subsequently alter[s] student behaviors."[368] More particularly, school personnel are trained on how to develop constructive behavior interventions, promote positive learning environments, reward appropriate student behavior, and apply these rewards and interventions consistently across time.[369] Studies show that positive behavioral support systems can improve student behavior and achievement.[370] This approach has proven so effective that the U.S. Department of Education has created a technical assistance center to help schools implement the program and has endorsed it as a remedy in schools with disproportionately high suspension and expulsion rates for minority students.[371]

To be clear, a number of schools have already adopted these programs, and some states have established programs to assist these districts.[372] But the state must do much more than offer technical assistance and wait on districts to voluntarily adopt these programs. States must actively fund and require transitions to new disciplinary environments in those schools where discipline is impeding the delivery of equal and adequate educational opportunities. Moreover, state involvement is

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[367] *See, e.g.*, MARILYN ARMOUR, ED WHITE MIDDLE SCHOOL RESTORATIVE DISCIPLINE EVALUATION: IMPLEMENTATION AND IMPACT 23–30, https://irjrd.org/files/2016/01/Ed-White-Evaluation-2012-2013.pdf [https://perma.cc/C4DB-GF3S]; MYRIAM L. BAKER, DPS RESTORATIVE JUSTICE PROJECT: YEAR THREE 9–17 (2009); INT'L INST. FOR RESTORATIVE PRACTICES, IMPROVING SCHOOL CLIMATE: FINDINGS FROM SCHOOLS IMPLEMENTING RESTORATIVE PRACTICES 6 (2009) http://www.iirp.edu/pdf/IIRP-Improving-School-Climate-2009.pdf [https://perma.cc/9KP2-F496]; L.A. UNIFIED SCH. DIST., RESTORATIVE JUSTICE IN ACTION (Oct. 28, 2014), https://boe.lausd.net/sites/default/files/10-28-14SSCRestorativeJusticeInAction.pdf [https://perma.cc/G9RX-YTHG]; *see also* Patricia Leigh Brown, *Opening Up, Students Transform a Vicious Circle*, N.Y. TIMES (Apr. 3, 2013), http://www.nytimes.com/2013/04/04/education/restorative-justice-programs-take-root-in-schools.html?_r=0 [https://perma.cc/G57F-SZPZ].

[368] Bradshaw et al., *supra* note 154, at 134.

[369] Nance, *supra* note 14, at 357–59.

[370] *See, e.g.*, Bradshaw et al., *supra* note 154, at 139–40; Douglas A. Cheney et al., *A 2-Year Outcome Study of the Check, Connect, and Expect Intervention for Students at Risk for Severe Behavior Problems*, 17 J. OF EMOTIONAL AND BEHAV. DISORDERS 226, 226–43 (2009); Robert Horner et al., *A Randomized Control Trial of School-Wide Positive Behavior Support in Elementary Schools*. 11 J. POSITIVE BEHAV. INTERVENTIONS 133, 133–44 (2009).

[371] U.S. DEP'T OF EDUC. OFFICE OF SPECIAL EDUC. PROGRAMS, *Technical Assistance Center on Positive Behavioral Interventions and Supports,* https://www.pbis.org/ [https://perma.cc/T8ZW-5P8N]; Dear Colleague Letter, *supra* note 19.

[372] *See, e.g.*, Bradshaw et al., *supra* note 154, at 134 (indicating that 9000 districts had adopted positive behavioral supports).

necessary to ensure that the programs are implemented properly. Research has shown that to be effective, the programs must be implemented carefully over an extended period of time.[373]

Whether a court would specifically require any particular program is uncertain. After deciding the first four elements in plaintiffs' claim (duty, harm, causation, responsibility), courts might direct the state, within its discretion, to enact a reasonable remedy.[374] Only if the state refuses to implement a reasonable remedy will courts be more proscriptive.[375] Regardless, the state would have a relatively clear set of remedial options: ensuring funding for local school districts to develop and implement their own discipline improvement plans; officially endorsing some non-punitive approach to discipline, such as positive behavioral supports; monitoring discipline data to identify problematic districts and schools and specifically targeting remedies there; and/or changing the statutory structure for school discipline to reduce reliance on suspension and expulsion.

C. Pros and Cons of a Systemic Duty-Based Approach to Discipline Versus an Individual Rights Approach

While the two legal theories for reforming school discipline theories are not mutually exclusive, they are very different in form and evidence. The theory that the deprivation of education through suspension triggers heightened scrutiny is more individual in nature, whereas the theory that problematic disciplinary environments interfere with quality education is group-based. As such, they would involve very different types of evidence and legal framing. There are advantages to each.

The advantage of the individual right to education is its relative simplicity. First, as described in Part II, the questions to be answered are all doctrinal. The cases could potentially proceed on the briefs without even resorting to evidentiary trials.[376] Second, the answers to the doctrinal

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[373] Bradshaw et al., *supra* note 154 (comparing fully implemented and trained programs to others); Nance, *supra* note 14, at 355–56 (emphasizing that restorative justice involves cultural change that does not happen quickly and requires sustained effort over three to five years).

[374] *See, e.g.*, Rose v. Council for Better Educ. Inc., 790 S.W.2d 186, 216 (Ky. 1989) ("The General Assembly must provide adequate funding for the system. How they do this is their decision."); Hoke Cty. Bd of Educ. v. State, 599 S.E.2d 365, 395 (N.C. 2004) ("[P]roviding specific remedies for violations [of the right to education] . . . is within [the executive and legislative branch's] primary domain.").

[375] *Abbott IV*, 710 A.2d 450, 458–61 (N.J. 1998); Campbell Cty. Sch. Dist. v. State, 907 P.2d 1238 (Wyo. 1995).

[376] In the few cases litigated thus far, the facts have involved only one or two students, been uncontested, and barely even warranted discussion in the courts' final opinions. In fact, the courts' description of the misbehavior was vague at best in several cases. *See, e.g.*, Doe v. Superintendent of Sch., 653 N.E.2d 1088, 1090 (Mass. 1995) (indicating the student had a blade in lipstick case); King *ex*

questions would, of course, be contested, but if a court recognized an individual right to education, heightened scrutiny would follow and plaintiffs' claims would almost automatically fall into place, as the burden would shift to the state. Third, the remedies would, likewise, be simple and immediate. Insofar as suspension and expulsion were overly broad responses under certain circumstances, a court could simply prohibit them or hold that schools must specifically justify them. In short, this individual claim offers the potential of quick, concrete victories.

The individual claim's weaknesses, however, are the systemic claim's strengths. While victory in individual claims might trigger broader substantive reforms, the remedies could just as easily be limited and potentially make matters worse. Schools could just stop suspending students without making any other changes,[377] which could make schools more dysfunctional.[378] If the underlying environment remains problematic, students will continue to misbehave and their numbers will increase. School officials, moreover, would blame courts for saddling them with problem students that the officials believe should be suspended or expelled.[379] In short, strict scrutiny could lead to blunt remedies that fail to address the fundamental challenges in school discipline.

In contrast, a school quality claim would focus exclusively on the fundamental problems in school discipline and force substantive reform of schools' disciplinary environment. This type of reform may be more palatable to both courts and schools. Because the focus is on improving school quality, not simply prohibiting suspensions, teachers and schools are more likely to favorably perceive it.[380] Courts' perceptions are also likely different because, unlike the individual right claim, it would not pit misbehaving students against others. It would also moot the forfeiture theory. In this context, courts would be asked to ensure quality education, not block the punishment of misbehaving students.

Finally, ensuring quality or equal education would not require courts to answer new doctrinal issues. Courts would only need to incorporate the

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rel. Harvey-Barrow v. Beaufort Cty. Bd. of Educ., 704 S.E.2d 259, 261 (N.C. 2010) (only indicating a fight involving multiple students occurred).

377 This was the explicit concern in *King*.

378 *King*, 704 S.E.2d at 264 (speculating that applying strict scrutiny would jeopardize the safety of schools).

379 According to Arum, *see supra* note 241, this was the response to *Goss v. Lopez*, 419 U.S. 565 (1975).

380 *See* Kevin McCorry, *Philly District Orders School Police to Stay Out of Level 1 Offenses*, NEWSWORKS (Mar. 25, 2014), http://www.newsworks.org/index.php/local/education/66215-philly-district-orders-school-police-to-stay-out-of-level-1-offenses [https://perma.cc/W6TX-3ZTF] (discussing teachers' negative response to basic prohibitions on referrals to law enforcement in Philadelphia because new policy did not address other underlying problems).

empirical evidence into existing doctrinal frameworks. This empirical evidence would also more clearly signal a positive end result, whereas the individual claim potentially asks courts to break new doctrinal ground and strike down practices with no assurance that what replaces them will improve education. In sum, the educational quality claim would make the most impact. The only significant drawback is that the litigation itself would be far more time- and resource-intensive, involving extensive social science evidence, state-wide analysis of discipline outcomes, connecting discipline data to academic outcomes, and establishing that this empirical evidence is sufficient to establish a constitutional violation.

CONCLUSION

Over the past few decades, precedent developed in school funding and quality litigation has generated nothing less than a rights revolution in state constitutional law. That rights revolution, however, has had almost no impact on the current crisis in school discipline. This disconnect is striking. In states where education is a constitutional or fundamental right, one would expect schools to be far more careful in suspending and expelling students. Likewise, empirical evidence increasingly demonstrates that school discipline policy and educational quality are inextricably linked. Yet, both courts and policymakers treat them as separate issues.

In their defense, momentous precedential changes can take years to absorb. School finance litigation went through its own developmental phase from the early 1970s into the 1990s. In some states, it is still developing. Discipline litigation has yet to experience this development and scholars have done very little to theorize it.

A constitutional right to education and the duties it imposes on the state should completely reframe how courts look at discipline. But the absence of school finance opinions explicitly linking education rights and quality to discipline has slowed this recognition. The path forward is twofold. First, courts must directly answer the question of whether the general constitutional duties and rights developed in school finance litigation also create an individual interest in education that, when taken away, triggers heightened scrutiny. All signals and logic indicate the answer should be yes. Second, litigants and courts must move beyond an individualized concept of discipline and focus on how discipline policy and practice interfere with the state's duty to deliver adequate and equal educational opportunities. The very quality of education students receive in a school will be largely a function of the disciplinary environment in the school. The disciplinary environment in many of the lowest achieving schools is also the most dysfunctional. In these schools, discipline

reform—not just academic reform—is a necessary intervention to ensure adequate and equal educational opportunities.